Supreme Court, U.S.
FILED
OCT 18 2010
OFFICE OF THE CLERK

177 6

10 809

No.

IN THE

Supreme Court of the United States

CHARLES FRANKLIN MURDOCH, JR.,

Petitioner,

v.

ROY CASTRO, WARDEN, AND
EDMUND G. BROWN, JR., ATTORNEY GENERAL
OF THE STATE OF CALIFORNIA,

Respondents.

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

STEVEN M. KLEPPER*
KRAMON & GRAHAM, P.A.
ONE SOUTH STREET
SUITE 2600
BALTIMORE, MARYLAND
21202
(410) 752-6030
sklepper@kg-law.com
* *Counsel of Record*

SEYMOUR I. AMSTER
LAW OFFICES OF SEYMOUR I.
AMSTER
6320 VAN NUYS BOULEVARD
SUITE 300
VAN NUYS, CALIFORNIA
91401
(818) 947-0104
AttyAmster@aol.com

COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

In *Harrington v. Richter* (No. 09-587), argued October 12, 2010, this Court requested that the parties brief and argue the question of whether AEDPA deference applies to a state court's summary disposition of a claim. Regardless of how this Court resolves *Richter*, Petitioner requests certiorari—whether to address a division of authority that likely will remain unresolved, or at least to summarily vacate and remand for further consideration.

Petitioner independently seeks certiorari with respect to the Ninth Circuit's holding, following Eighth Circuit cases, that this Court has opened the door to state law privileges trumping the Confrontation Clause of the Sixth Amendment. The questions are as follows:

1. Does AEDPA deference apply to a state court opinion addressing only the petitioner's state law claims, without mention of the petitioner's Federal law claims, including claims under the Confrontation Clause of the Sixth Amendment?

2. Did *Swidler & Berlin v. United States*, 524 U.S. 399, 118 S. Ct. 2081, 141 L. Ed. 2d 379 (1998), abrogate this Court's Confrontation Clause decisions holding that only an accuser's Fifth Amendment privilege against self-incrimination can bar cross-examination regarding matters relevant to the accuser's bias? If not, is Petitioner entitled to a writ of habeas corpus?

PARTIES TO THE PROCEEDING

The parties to this proceeding are Petitioner Charles Franklin Murdoch, Jr. and Respondents Edmund G. Brown, Jr., Attorney General of the State of California, and Roy Castro, Warden. There are no corporate parties to this appeal.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3

A. Murdoch's Conviction 3

B. State Appeals 6

C. Proceedings Below 7

REASONS FOR GRANTING THE PETITION 8

I. AEDPA DEFERENCE CANNOT APPLY WHERE CIRCUMSTANCES DEMONSTRATE THAT THE STATE COURT OVERLOOKED THE FEDERAL CLAIM 8

A. This Case Has Created a Circuit Split That Would Remain If the Court Rules for the State in *Richter* 8

B. The California Courts Overlooked Murdoch's Federal Claim 10

TABLE OF CONTENTS (Continued)

Page

C. If the Court Rules Against the State on "Silent Denial" Grounds in *Richter*, This Case Provides an Opportunity for a Broader Ruling 13

D. If the Court Rules More Broadly Against the State in *Richter*, Summary Relief on Certiorari Is Appropriate 15

II. ON THE MERITS, HABEAS RELIEF IS WARRANTED BECAUSE THE SUPERIOR COURT IMPROPERLY LIMITED MURDOCH'S CROSS-EXAMINATION OF HIS ACCUSER 16

A. This Court's Pre-1998 Precedents Do Not Permit State Law Exceptions to the Confrontation Clause 17

B. The Ninth Circuit Misread *Swidler* 20

C. Murdoch Is Entitled to a Writ of Habeas Corpus 25

CONCLUSION 28

APPENDIX

United States Court of Appeals for the Ninth Circuit, Plurality Opinion (Tashima, J.), dated June 21, 2010 ..... App. 1

United States Court of Appeals for the Ninth Circuit, Concurring Opinion (Silverman, J.), dated June 21, 2010 ..... App. 29

TABLE OF CONTENTS (Continued)

Page

United States Court of Appeals for the Ninth Circuit, Dissenting Opinion (Kozinski, C.J.), dated June 21, 2010 ..... App. 31

United States Court of Appeals for the Ninth Circuit, Dissenting Opinion (Thomas, J.), dated June 21, 2010 ..... App. 68

United States District Court for the Central District of California, Report and Recommendation, dated March 7, 2005 ..... App. 69

United States District Court for the Central District of California, Order Adopting Report and Recommendation, dated April 7, 2005 ..... App. 96

Court of Appeal of the State of California, Opinion, dated March 26, 1998 ..... App. 98

Supreme Court of California, Order, dated July 8, 1998 ..... App. 135

TABLE OF AUTHORITIES

Page

CASES

Alford v. United States, 282 U.S. 687, 51 S. Ct. 218, 75 L. Ed. 624 (1931) 17, 18

Bockting v. Bayer, 399 F.3d 1010 (9th Cir. 2005) ... 23

Brookhart v. Janis, 384 U.S. 1, 86 S. Ct. 1245, 16 L. Ed. 2d 314 (1966) 26

Canaan v. McBride, 395 F.3d 376 (7th Cir. 2005) 8

Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006) 21

Chadwick v. Janecka, 312 F.3d 597 (3d Cir. 2002) 9, 15

Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) 19

Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) 23

Danner v. Kentucky, 525 U.S. 1010, 119 S. Ct. 529, 142 L. Ed. 2d 439 (1998) 8, 9

Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974) .....passim

Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) 19, 26, 28

Douglas v. Alabama, 380 U.S. 415, 85 S. Ct. 1074, 13 L. Ed. 2d 934 (1965) 17

TABLE OF AUTHORITIES (Continued)

Page

Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972) 22

Johnson v. Norris, 537 F.3d 840 (8th Cir. 2008) 22

Lyell v. Renico, 470 F.3d 1177 (6th Cir. 2006) 8

Newton v. Kemna, 354 F.3d 776 (8th Cir. 2004) 22

Norde v. Keane, 294 F.3d 401 (2d Cir. 2002) 9

Olden v. Kentucky, 488 U.S. 227, 109 S. Ct. 480, 102 L. Ed. 2d 513 (1988) 19

Pennsylvania v. Ritchie, 480 U.S. 39, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987) 21, 22

People v. Mincey, 827 P.2d 388 (Cal. 1992) 11

People v. Williams, 98 Cal. Rptr. 3d 770 (Ct. App. 2009) 11

Rompilla v. Beard, 545 U.S. 374, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005) 12

Shelton v. Purkett, 563 F.3d 404 (8th Cir. 2009) 8

Smith v. Illinois, 390 U.S. 129, 88 S. Ct. 748, 19 L. Ed. 2d 956 (1968) ..... passim

Swidler & Berlin v. United States, 524 U.S. 399, 118 S. Ct. 2081, 141 L. Ed. 2d 379 (1998) ..... passim

TABLE OF AUTHORITIES (Continued)

Page

Vela v. Superior Court, 255 Cal. Rptr. 921 (Ct. App. 1989) 11, 12

Weeks v. Angelone, 528 U.S. 225, 120 S. Ct. 727, 145 L. Ed. 2d 727 (2000) 15

Whorton v. Bockting, 549 U.S. 406, 127 S. Ct. 1173, 167 L. Ed. 2d 1 (2007) 23

Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) 12

Williams v. Taylor, 529 U.S. 420, 120 S. Ct. 1479, 146 L. Ed. 2d 435 (2000) 9

Ylst v. Nunnemaker, 501 U.S. 797, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991) 10

STATUTES AND RULES

28 U.S.C. § 1254 1

28 U.S.C. § 2254 ..... passim

Cal. Evid. Code §§ 1035 to 1038.2 24

Cal. R. Ct., Rule 8.1115 11

Fed. R. Evid. 501 20

OTHER AUTHORITIES

Martha Dragich Pearson, *Citation of Unpublished Opinions as Precedent*, 55 Hastings L.J. 1235 (May 2004) 11

Charles Alan Wright et al., 23 Fed. Prac. & Proc. Evid. §§ 5426 to 5431 (supp. 2010) 24

PETITION FOR CERTIORARI

Charles Franklin Murdoch, Jr. respectfully petitions for a writ of certiorari to review the judgment of the Ninth Circuit.

OPINIONS BELOW

The plurality, concurring, and two dissenting opinions of the *en banc* Ninth Circuit are reported at 609 F.3d 983 (*Murdoch III*) and reprinted herein at App. 1, 29, 31, and 68. The 2004 panel opinion of the Ninth Circuit is reported at 365 F.3d 699 (*Murdoch I*). The 2007 panel decision of the Ninth Circuit is reported at 489 F.3d 1063 (*Murdoch II*). The 2008 order granting *en banc* rehearing is reported at 546 F.3d 1051. The pertinent District Court opinion and order are unreported and reprinted herein at App. 69 and App. 96.

Also reprinted herein are the March 26, 1998 unreported opinion of the California Court of Appeal denying Murdoch's appeal and petition (App. 98) and the July 8, 1998 order of the California Supreme Court denying review (App. 135).

JURISDICTION

The Ninth Circuit issued its *en banc* decision on June 21, 2010. On August 17, 2010, this Court (KENNEDY, J.) extended until October 19, 2010 the time for Murdoch to petition for certiorari. Murdoch invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

The Supremacy Clause of Article VI provides that the "Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254, provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

The Ninth Circuit has split from at least four other Circuits, becoming the first to find that a reasoned state court opinion, which overlooks rather than decides a Federal claim, is entitled to AEDPA deference. Such a ruling has no grounding in the language of AEDPA or in the principles of federalism underlying that statute. The Court should grant certiorari to resolve this division of authority.

On the merits, the Ninth Circuit, joining the Eighth Circuit, read this Court's 1998 decision in *Swidler* as opening the door to state law privileges trumping the Federal right to cross-examine one's accuser on subjects relevant to impeachment. Under this reasoning, AEDPA gives state courts virtually unchecked discretion to invoke state law privileges to limit cross-examination of an accuser. The Eighth and Ninth Circuits misread *Swidler*, a non-constitutional decision, and are irreconcilable with this Court's Confrontation Clause decisions and the Supremacy Clause. Federalism means that Federal courts must give due respect to state courts; it does not mean that state law preempts Federal rights.

As set forth in this petition, Murdoch is entitled to a writ of habeas corpus and a new trial.

A. Murdoch's Conviction

On May 17, 1983, four men robbed the Horseshoe Bar in Long Beach, California. During the course of the robbery, one bystander was shot and killed; another was stabbed and severely wounded. The robbers left behind a fingerprint. The crime went

unsolved until 11 years later, when advances in fingerprint technology enabled police to identify Dino Dinardo as one of the perpetrators.

Officers arrested Dinardo on June 30, 1994. Dinardo initially denied any involvement in the crime, but he later recanted and admitted his involvement. He identified Murdoch as one of his accomplices. The State charged both Dinardo and Murdoch with murder in the Los Angeles County Superior Court.

The State tried Dinardo first. At a suppression hearing, Dinardo tes tified that his confession had been coerced, and that he had given the confession in exchange for a promise that he would be released to see his wife and daughter. Dinardo was convicted and was sentenced to imprisonment of 25 years to life.

At sentencing, the Superior Court expressed doubt that the State could convict Murdoch without Dinardo's testimony, while noting the court's discretion to reduce Dinardo's sentence. In return for Dinardo's agreement to testify against Murdoch, Dinardo received a reduction of his conviction to voluntary manslaughter and a reduced sentence of 12 years' imprisonment.

Dinardo was a key witness at Murdoch's trial. He testified that he and Murdoch, together with two other men, robbed the Horseshoe Bar. According to Dinardo, Murdoch carried a .22 caliber rifle and announced, "This is a stick up." While Dinardo was fumbling with the buttons on the cash register, he heard a gunshot, emptied the register, and ran out

the back door, joining the other two men in the getaway car, with Murdoch joining them about a minute later. Dinardo recalled seeing Murdoch in possession of the rifle both in the bar and in the car.

During trial, the prosecutor informed the Superior Court of the existence of a letter from Dinardo to his former counsel stating that the police coerced him into implicating Murdoch in the crime. That letter (as the record in this action reveals) stated approximately as follows:

> I would like to make a statement about the facts surrounding my arrest for robbery and murder. I was taking care of my young daughter when Long Beach police arrested me at my home in Berkeley. Two policemen, Detective Pavek and his partner, took me to the Berkeley Police Department and interviewed me. I wanted to get back to my daughter as I worried about her welfare. At that time, Detective Pavek coerced a statement from me and promised not to charge me if I made a statement that Charles Murdoch participated in the crime. But, I do not actually know Mr. Murdoch, although I know his brother. Mr. Murdoch and I did not commit any crime.

Upon objection by Dinardo's then-counsel, the Superior Court concluded that the letter was protected by the attorney-client privilege, and it ruled that Murdoch could not use the letter to

impeach Dinardo on cross-examination. Murdoch was convicted of first-degree murder and received a sentence of life imprisonment without parole.

B. State Appeals

Murdoch filed a direct appeal to the California Second District Court of Appeal and also filed a habeas corpus petition with the same court. His brief raised eleven arguments. The first ten were objections under California law. The eleventh raised objections under the United States Constitution:

> XI. EVEN IF DINARDO'S LETTER WERE PRIVILEGED, APPELLANT'S 5TH AND 6TH AMENDMENT RIGHTS TO A FAIR TRIAL AND TO CONFRONT AND CROSS-EXAMINE THE CHIEF WITNESS AGAINST HIM WOULD TAKE PRECEDENCE OVER DINARDO'S ATTORNEY-CLIENT PRIVILEGE UNDER THE PARTICULAR FACTS OF THIS CASE

On March 26, 1998, the Court of Appeal denied Murdoch's direct appeal and habeas petition in a 26-page unpublished opinion. The opinion thoroughly addressed Murdoch's ten state law claims.

But the Court of Appeal counted only to ten, not eleven. It never mentioned Murdoch's Federal claim or the Sixth Amendment. App. 105-133. The Court of Appeal affirmed Murdoch's life sentence.

Murdoch petitioned to the California Supreme Court, which summarily denied review on July 8, 1998. App. 135.

C. Proceedings Below

On July 6, 1999, Murdoch petitioned the United States District Court for the Central District of California for a writ of habeas corpus. The District Court denied the petition on March 7, 2002.

On April 5, 2004, the Ninth Circuit held in *Murdoch I* that AEDPA deference did not apply. It vacated and remanded with instructions for the District Court to obtain Dinardo's letter and to review Murdoch's Confrontation Clause claim on the merits.

The District Court, finding that the constitutional error was harmless, again denied the petition on April 7, 2005. App. 96. On June 12, 2007, a divided three-judge panel of the Ninth Circuit affirmed in *Murdoch II*.

On October 9, 2008, the Ninth Circuit granted Murdoch's petition for rehearing *en banc*. On June 21, 2010, in *Murdoch III*, a divided 11-judge Ninth Circuit panel overruled *Murdoch I*, held that AEDPA deference applied, and affirmed the denial of the writ.

REASONS FOR GRANTING THE PETITION

I. AEDPA DEFERENCE CANNOT APPLY WHERE CIRCUMSTANCES DEMONSTRATE THAT THE STATE COURT OVERLOOKED THE FEDERAL CLAIM

A. This Case Has Created a Circuit Split That Would Remain If the Court Rules for the State in *Richter*

The Ninth Circuit has "become the only court in the country to hold that a state court may adjudicate a constitutional claim 'on the merits' by overlooking it, and then have its carelessness rewarded with AEDPA's presumption that its adjudication was good enough for government work." App. 60 (Kozinski, C.J., dissenting).

It is not unusual for a state court to issue a reasoned decision that fails to mention a Federal constitutional challenge. *See, e.g., Danner v. Kentucky*, 525 U.S. 1010, 119 S. Ct. 529, 529, 142 L. Ed. 2d 439 (1998) (SCALIA, J., dissenting from denial of certiorari) ("Although petitioner objected that this procedure violated his constitutional right to confront his accuser, neither the trial court nor the [Kentucky] Supreme Court so much as mentioned the Sixth Amendment.").

Until this case, the authorities were unanimous that AEDPA deference is not warranted in such a situation. *Shelton v. Purkett*, 563 F.3d 404, 409 (8th Cir. 2009); *Lyell v. Renico*, 470 F.3d 1177, 1182 (6th Cir. 2006); *Canaan v. McBride*, 395 F.3d 376, 382

(7th Cir. 2005); *Norde v. Keane*, 294 F.3d 401, 410 (2d Cir. 2002).

This division of authority would not disappear if the Court were to hold in *Richter* that summary dispositions are adjudications on the merits. Even in the Circuits that afford AEDPA deference to summary adjudications, *de novo* review "govern[s] when the opinion of a state court reveals that it did not adjudicate a claim." *Chadwick v. Janecka*, 312 F.3d 597, 606 (3d Cir. 2002) (Alito, J.).

Although, for instance, the Second Circuit generally defers to summary dispositions, it applies a multi-factor test to determine whether in a particular case the petitioner can establish that the Federal claim was not in fact adjudicated on the merits. *Norde*, 294 F.3d at 410. A reasoned decision addressing only the petitioner's state law challenges, not his Federal claims, satisfies that burden. *Id.*

Such a distinction makes sense. In *Richter*, the State and supporting *amici* offer the federalism-based argument that State courts lack the time and resources to issue a reasoned opinion in every case. But these considerations do not apply where—as in *Danner*, *Shelton*, *Lyell*, *Canaan*, *Norde*, and this case—the state court already took the time to reduce its reasoning to a written opinion, which establishes that the court overlooked the Federal claim.

"AEDPA's purpose [is] to further the principles of comity, finality, and federalism." *Williams v. Taylor*, 529 U.S. 420, 436, 120 S. Ct. 1479, 146 L. Ed. 2d 435 (2000) (KENNEDY, J.). AEDPA therefore ensures that state courts are the primary forum for

determining whether a state prosecution comported with Federal law. *Id.* at 437-38. Where the petitioner can establish that the state court failed even to consider his Federal claim, it means that the state court offered no forum at all.

B. The California Courts Overlooked Murdoch's Federal Claim

Unlike in *Richter*, which involved only an unreasoned summary order, the record in this case demonstrates the California courts' reasoning. The petitioner in *Richter* originally filed his habeas petition with the California Supreme Court, which issued only the one-page summary order. By contrast, Murdoch originally petitioned the California Court of Appeal, which issued a 26-page opinion. Although the California Supreme Court did not explain its denial of review, there is a rebuttable presumption that the California Supreme Court followed the reasoning of the opinion below. *Ylst v. Nunnemaker*, 501 U.S. 797, 803-06, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991) (SCALIA, J.). This presumption "looks through" to the "last reasoned decision" of the California courts. *Id.* at 804. The deference analysis therefore turns on whether the Court of Appeal adjudicated Murdoch's Federal claim on the merits.

The Court of Appeal's 26-page opinion addressed only Murdoch's state law claims on the merits. The Ninth Circuit plurality conceded that the Court of Appeal "did not mention the Confrontation Clause in its opinion." App. 16. All it found was a discussion and quote "from the section of Murdoch's brief in

which he raised the issue," and a citation to a case that "dealt with the tension between the attorney-client privilege and the Confrontation Clause." *Id.* But the California Court of Appeal analyzed those arguments and authorities only as they related to state law privilege issues. App. 117-123. There was not even a boilerplate "catch-all" line to the effect of "we have considered Murdoch's other arguments and reject them." App. 38, 134.

As Judge Kozinski's dissent establishes, the explanation for the Court of Appeal's failure to sustain Murdoch's Confrontation Clause objection is clear. It was an oversight.[1] Murdoch cited precedents of the Supreme Court and the Second District Court of Appeal unambiguously holding that the attorney-client privilege must yield to the Confrontation Clause if the material is probative of bias, including the witness's belief that his or her testimony will result in a lenient sentence. *People v. Mincey*, 827 P.2d 388, 422 (Cal. 1992) (collecting authorities); *Vela v. Superior Court*, 255 Cal. Rptr. 921, 926 (Ct. App. 1989). This Confrontation Clause claim was Murdoch's eleventh enumerated

---

[1] It is not surprising that an unpublished opinion might miss a winning argument. "[U]npublished opinions are rather hastily prepared, by law clerks or staff attorneys, with little oversight by judges, and without attention to careful wording or possible future implications." Martha Dragich Pearson, *Citation of Unpublished Opinions as Precedent*, 55 Hastings L.J. 1235, 1302 (May 2004). California courts go so far as to prohibit citation of unpublished Court of Appeal opinions, except in narrow circumstances. Cal. R. Ct., Rule 8.1115. "[P]ersistent use of unpublished authority may be cause for sanctions." *People v. Williams*, 98 Cal. Rptr. 3d 770, 777 (Ct. App. 2009).

argument, but the Court of Appeal addressed only the first ten arguments.

The Ninth Circuit plurality scoffed at the notion that the California courts overlooked Murdoch's Confrontation Clause argument. But it did not (and could not) identify any principled basis on which the Court of Appeal could have rejected that claim. By the plurality's reasoning, the case to create ambiguity in this Court's Confrontation Clause jurisprudence was *Swidler*. *Post* § II. But this Court issued *Swidler* on June 25, 1998. *Swidler* postdated the Court of Appeal's March 1998 opinion. Particularly in view of the California decisions in *Mincey* and *Vela*, it is difficult to construct a pre-June 1998 argument against Murdoch's Sixth Amendment challenge.

Rather than construct such an argument, the Ninth Circuit plurality found it irrelevant whether the California courts overlooked Murdoch's arguments. It reasoned that the non-deferential *de novo* standard of review, set forth in *Rompilla v. Beard*, 545 U.S. 374, 390, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005), and *Wiggins v. Smith*, 539 U.S. 510, 534, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003), applies only where a state court expressly and intentionally declines to reach a claim. App. 19-21.

This distinction lacks substance or principle. Section 2254(d) grants deference where the claim "was adjudicated on the merits in State court proceedings." It tortures this statutory language to equate an oversight with adjudication on the merits. Such an oversight, just like the intentional omissions

at issue in *Rompilla* and *Beard*, is a failure to adjudicate a claim on the merits. The Second, Sixth, Seventh, and Eighth Circuits have recognized this fact. But the Ninth Circuit has made a new and unjustified departure from the statute and this Court's decisions.

Thus, even if the Court rules for the State in *Richter*, this Court should grant certiorari to resolve the division of authority that this case implicates.

C. If the Court Rules Against the State on "Silent Denial" Grounds in *Richter*, This Case Provides an Opportunity for a Broader Ruling

The Court recognizes the need to clarify when a claim was "adjudicated on the merits in State court proceedings" under § 2254(d). In *Harrington v. Richter*, 130 S. Ct. 1506, 176 L. Ed. 2d 108 (2010), this Court *sua sponte* directed the parties to "brief and argue the following question: Does AEDPA deference apply to a state court's summary disposition of a claim . . . ?" *Id.* at 1506-07.

The Respondent's principal argument in *Richter* is that California law recognizes four types of summary adjudications, and that the particular type at issue—a "silent denial," which occurs when a majority of justices vote to deny the petition but cannot agree whether the denial is on the merits or on procedural grounds—is not an adjudication on the merits. If the Court decides *Richter* on this narrow ground, certiorari will be necessary to address the AEDPA deference issue in other contexts.

In such an event, this case would provide an opportunity for the Court to issue a broader ruling. At first blush, a case involving a 26-page state-court opinion may not seem a good candidate for a ruling on whether summary opinions are entitled to deference. But, in granting deference in this case, the Ninth Circuit treated the absence of analysis of the Federal claim as a summary adjudication of that claim: "[W]hen there is no reasoned state court opinion explaining the denial of a defendant's claim in any respect, we must assume that the state court has decided all the issues and perform an independent review of the record to ascertain whether the state court decision was objectively reasonable." App. 16.

This case highlights a fact strongly weighing against AEDPA deference to summary dispositions: judges are human beings who sometimes overlook meritorious arguments. *Ante* § I.A. In such a case, the state court has not served its AEDPA role as the primary forum for constitutional challenges. Cases like Murdoch's, unlike cases involving one-page orders, allow the petitioners to pull back the curtain to reveal this unfortunate fact.

Perhaps the Court ultimately will find that, on balance, the asserted benefits of deferring to summary dispositions outweigh the costs. At the very least, however, the Court should decide this issue in a case that highlights the cost to individual petitioners like Murdoch, whose constitutional claims went unheard.

D. If the Court Rules More Broadly Against the State in *Richter*, Summary Relief on Certiorari Is Appropriate

Alternatively, the Court could rule in *Richter* that AEDPA deference requires, at a minimum, that the state court identified the Federal claim (by name or by numbered argument) and indicated that it was rejecting the Federal claim on the merits. *Chadwick*, 312 F.3d at 606 (Alito, J.) (discussing *Weeks v. Angelone*, 528 U.S. 225, 231, 120 S. Ct. 727, 145 L. Ed. 2d 727 (2000)). Or the Court could rule even more broadly that AEDPA deference requires some explanation of the state court's rationale.

In either event, the Ninth Circuit erred in affording deference to the California Court of Appeal's opinion, which did not mention Murdoch's Federal claim by name (Confrontation Clause) or number (argument number 11). The Court could therefore enter a summary "GVR" order, granting certiorari, vacating the decision below, and remanding with instructions for the Ninth Circuit to reconsider its *en banc* opinion in view of *Richter*. The plurality expressly ruled on the merits of Murdoch's Confrontation Clause claim solely under the highly deferential AEDPA standard and made no alternative holding as to how it would rule on *de novo* review. App. 28.

Murdoch urges the Court, however, to grant certiorari to address the merits of his Confrontation Clause claim. As set forth in the next section, that issue independently merits certiorari.

II. ON THE MERITS, HABEAS RELIEF IS WARRANTED BECAUSE THE SUPERIOR COURT IMPROPERLY LIMITED MURDOCH'S CROSS-EXAMINATION OF HIS ACCUSER

The Court separately can and should grant certiorari on Murdoch's substantive constitutional challenge: that the Superior Court violated Murdoch's Confrontation Clause rights by barring him from questioning Dinardo regarding the exculpatory letter.

Because the Court of Appeal failed to adjudicate this claim on the merits, § 2254(d) is inapplicable, and *de novo* review applies. *Supra* § I. But even if this Court were to hold that AEDPA deference applies, the California Court of Appeal's denial of relief nevertheless contravened, and involved an unreasonable application of, this Court's precedents.

Since first holding that the Confrontation Clause binds the states, this Court has consistently held that a trial court cannot bar inquiry into relevant subjects of impeachment of an accuser, except to protect another Federal right, the privilege against self-incrimination. The Court has rejected state law exceptions to this rule.

But the Ninth Circuit has taken a different, dangerous approach. Endorsing Eighth Circuit decisions, the plurality held that AEDPA permits any state law privilege to trump the Confrontation Clause until this Court expressly rules otherwise—so long as the state can offer a "principled argument" for why the privilege is more important than the specific privileges at issue in this Court's precedents.

For the purposes of the Supremacy Clause, however, all state law privileges are created equally. If in conflict with a Federal constitutional right, state law must yield. The Court should grant certiorari to preserve the Supremacy Clause and the Confrontation Clause in state prosecutions.

A. This Court's Pre-1998 Precedents Do Not Permit State Law Exceptions to the Confrontation Clause

This Court first applied the Confrontation Clause to the states in 1965. *Douglas v. Alabama*, 380 U.S. 415, 418, 85 S. Ct. 1074, 13 L. Ed. 2d 934 (1965). Shortly thereafter, the Court reversed the conviction of a defendant who "was denied the right to ask the principal prosecution witness either his name or where he lived, although the witness admitted that the name he had first given was false." *Smith v. Illinois*, 390 U.S. 129, 131, 88 S. Ct. 748, 19 L. Ed. 2d 956 (1968). "'It is the essence of a fair trial that reasonable latitude be given the cross-examiner.'" *Id.* at 132 (quoting *Alford v. United States*, 282 U.S. 687, 692, 51 S. Ct. 218, 75 L. Ed. 624 (1931)). "'Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them.'" *Id.* (quoting *Alford*, 282 U.S. at 692).

Smith recognized only three restrictions that a trial court could place on cross-examination of an accuser. First, a trial court must protect the accuser's own properly invoked Fifth Amendment privilege against self-incrimination. Second, a trial

court can prohibit cross-examination on irrelevant subjects—that is, questions that merely harass, annoy, or humiliate the witness. Third, within these bounds, a trial court has discretion to determine the manner of questioning, including discretion to decide when defense counsel has exhausted questioning on a relevant subject. *Smith*, 390 U.S. at 132-33 (quoting *Alford*, 282 U.S. at 694).

Since the 1960s, then, this Court's Confrontation Clause precedents have directed that "'no obligation is imposed on the [state] . . . to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional protection from self incrimination, properly invoked.'" *Smith*, 390 U.S. at 132-33 (quoting *Alford*, 282 U.S. at 694).

In 1974, this Court rejected a proposed Confrontation Clause exception for Alaska's statutory privilege for juvenile convictions. In *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974), the trial court had granted a protective order precluding the defense from questioning the key prosecution eyewitness regarding a juvenile conviction for burglary. This protective order violated the Confrontation Clause, under which "the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness." *Id.* at 316. Notwithstanding the state's interest in protecting juveniles, this Court reiterated that the Fifth Amendment privilege

against self-incrimination was the only basis for barring inquiry into a relevant subject matter on cross-examination of an accuser. *Id.* at 320 (citing *Alford*, 282 U.S. at 694).

This Court has never retreated from *Smith* and *Davis* or recognized additional exceptions (much less state law exceptions) to the right of the accused to cross-examine his accuser on relevant subjects. Rather, the Court has rejected various subject-matter restrictions on cross-examination of accusers. *Olden v. Kentucky*, 488 U.S. 227, 232, 109 S. Ct. 480, 102 L. Ed. 2d 513 (1988) (potential that revealing accuser's "interracial relationship would prejudice the jury against her" did not fall within "reasonable limits on defense counsel's inquiry into the potential bias of a prosecution," where testimony on that subject matter directly attacked accuser's credibility); *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) ("the trial court prohibited all inquiry into the possibility that [the accuser] would be biased as a result of the State's dismissal of his pending public drunkenness charge"); *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) (Confrontation Clause preempted "Mississippi common-law rule that a party may not impeach his own witness").

The Ninth Circuit, after holding that § 2254(d) applied to this case, denied relief because the "relationship between the Confrontation Clause and the attorney-client privilege has not been clearly established by the Supreme Court." App. 27. This

reasoning is backwards. The precedents of this Court were clear in 1998, and remain clear, that the only recognized exception to the Confrontation Clause is another Federal constitutional right, the Fifth Amendment privilege against self-incrimination.

B. The Ninth Circuit Misread *Swidler*

Notwithstanding the Supremacy Clause and this Court's precedents, the Ninth Circuit held that a state law privilege could trump Murdoch's rights under the Confrontation Clause. This misconception stems from a misreading of *Swidler & Berlin v. United States*, 524 U.S. 399, 118 S. Ct. 2081, 141 L. Ed. 2d 379 (1998).

Swidler had nothing to do with the Confrontation Clause. Rather, *Swidler* involved a motion to quash a grand jury subpoena, directed to a law firm, seeking privileged materials relevant to the investigation of firings at the White House Travel Office. The Court held that the attorney-client privilege under Fed. R. Evid. 501 survived the suicide of the firm's client, thus preventing disclosure of notes of conversations with the client regarding the firings. 524 U.S. at 401. In a footnote, the Court noted that the law firm, "while opposing wholesale abrogation of the privilege in criminal cases, concede[d] that exceptional circumstances implicating a criminal defendant's constitutional rights might warrant breaching the privilege." *Id.* at 409 n.3. But the Court declined to "reach this issue, since such exceptional circumstances clearly are not presented here." *Id.*

Thus, both the petitioners and the respondent in *Swidler* agreed that the notes might have been discoverable if a criminal defendant's constitutional rights were at stake. By its footnote, the Court merely cautioned that it was not deciding anything with respect to the application of privilege if and when the grand-jury investigation resulted in indictments and trials. Such *dicta* plays no part in the AEDPA analysis. *Carey v. Musladin*, 549 U.S. 70, 74, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006). Nothing in this cautionary footnote suggests that the Court was revisiting three decades of Confrontation Clause jurisprudence.

Swidler's holding as to pre-indictment subpoenas necessarily had no bearing on the Court's precedents regarding cross-examination at trial. "The opinions of this Court show that the right to confrontation is a *trial* right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination." *Pennsylvania v. Ritchie*, 480 U.S. 39, 52, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987) (emphasis in original). "The ability to question adverse witnesses, however, does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony." *Id.* at 53. In *Ritchie*, the Court contrasted *Davis* with its decisions rejecting Confrontation Clause claims predicated on a witness' inability to remember key testimony, or on the failure to disclose certain items that could have been used in cross-examination. *Id.* at 53-54 & n.10. Such authorities were in "full accord with our earlier decisions that have upheld a

Confrontation Clause infringement claim on this issue only when there was a specific statutory or court-imposed restriction at trial on the scope of questioning." *Id.* at 53-54.

Murdoch's objection involves a "court-imposed restriction at trial on the scope of questioning," *id.*, not matters of pretrial disclosure. Here, the State disclosed the existence of Dinardo's letter stating that he was coerced into identifying Murdoch. Once the State called Dinardo as a witness, due process required the State to make such a disclosure. *Giglio v. United States*, 405 U.S. 150, 153-55, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972). The Superior Court wrongly prevented Murdoch, once he knew of the letter, from using it to cross-examine Dinardo. This objection falls squarely within the Court's established Sixth Amendment case law. *Ritchie*, 480 U.S. at 52.

Unfortunately, the Ninth Circuit missed this distinction between pretrial disclosure and mid-trial restrictions on cross-examination. This misconception finds it root in decisions of the Eighth Circuit misreading the non-constitutional decision in *Swidler* as inviting new exceptions to the Confrontation Clause. *See Johnson v. Norris*, 537 F.3d 840, 846-47 (8th Cir. 2008); *Newton v. Kemna*, 354 F.3d 776, 781-82 (8th Cir. 2004). According to the Eighth Circuit, footnote 3 of *Swidler* opened the question of whether *Davis* permits an exception to the attorney-client privilege. The Ninth Circuit followed these Eighth Circuit decisions and held that Murdoch's constitutional claim necessarily presented

an "open question" barring relief under AEDPA. App. 24.

Certiorari is important not just to reverse the Ninth Circuit's misreading of *Swidler* but to abrogate the even-more-pernicious Eighth Circuit decisions. Those decisions involved the physician-patient privilege and the psychotherapist-patient privilege, not the attorney-client privilege. By extension of its misreading of *Swidler*, the Eighth Circuit has held that AEDPA bars review of state court orders regarding *any* state law privilege, except where the Court has specifically rejected that privilege as a Confrontation Clause exception—that is, the juvenile-records privilege and perhaps the marital privilege.[2] *Id. See* App. 26.

AEDPA would thus preclude Confrontation Clause challenges regarding any number of state law privileges—including communications with clergy, accountants, journalists, social workers, researchers, banking regulators, guardians ad litem, marriage counselors, and nurses—not to mention California

---

[2] The marital privilege was at issue in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Although the plurality and the dissents in this appeal reference *Crawford*, Murdoch does not (and need not) rely on *Crawford*. Briefing in this appeal took place in 2006, after the Ninth Circuit determined that *Crawford* applied retroactively, but before this Court held that *Crawford* applied only prospectively. *See Bockting v. Bayer*, 399 F.3d 1010 (9th Cir. 2005), *rev'd sub nom., Whorton v. Bockting*, 549 U.S. 406, 127 S. Ct. 1173, 167 L. Ed. 2d 1 (2007). *Davis*, *Smith*, and this Court's other pre-1998 decisions are more than sufficient to warrant habeas relief under any standard.

privileges for communications with sexual assault counselors, domestic violence counselors, and human trafficking caseworkers. *See* Charles Alan Wright et al., 23 Fed. Prac. & Proc. Evid. §§ 5426 to 5431 (supp. 2010); Cal. Evid. Code §§ 1035 to 1038.2. By this rationale, if a state enacted a privilege for communications with veterinarians, judges in that state could limit cross-examination of pet-owners until this Court specifically decided otherwise.

The Ninth Circuit did not sweep quite as broadly as the Eighth Circuit, finding it sufficient that the "state court could have found a principled reason" that the attorney-client privilege was worthier of protection than the juvenile records privilege or the marital privilege. App. 26. But, by extension, AEDPA would mandate deference if the State offered a "principled reason" why, for instance, its unique "sexual assault counselor" privilege was similarly worthy of heightened protection in sexual assault prosecutions.

These Eighth and Ninth Circuit decisions threaten virtually any habeas challenge to a state law conviction, no matter how clear the violation. A clever prosecutor would need only to scour the case law—including, as here, precedents having nothing to do with the constitutional provision at issue—to manufacture ambiguity in this Court's precedents, and then argue that AEDPA barred review until this Court rejected that claim.

This Court should grant certiorari to correct the Eighth and Ninth Circuits' plain misreading of *Swidler*. *Cf. Marx v. Texas*, 528 U.S. 1034, 120 S.

Ct. 574, 575, 145 L. Ed. 2d 436 (1999) (SCALIA, J., dissenting from denial of certiorari) ("I do not think the Court should ever depart from the plain meaning of the Bill of Rights. But when it does take such a step into the dark it has an obligation, it seems to me, to clarify as soon as possible the extent of its permitted departure."). These holdings are not merely wrong, but dangerously wrong. This Court's Confrontation Clause precedents recognize only the Fifth Amendment privilege against self-incrimination, not any state law privilege, as a bar to cross-examination on matters relevant to the accuser's bias or lack of credibility.

C. Murdoch Is Entitled to a Writ of Habeas Corpus

If this Court agrees that the Ninth Circuit misread *Swidler* and this Court's Confrontation Clause decisions, the inquiry circles back to the question originally at issue in this appeal: whether Murdoch is entitled to a writ of habeas corpus vacating his conviction.

Murdoch respectfully urges this Court to reverse outright, as Judge Kozinski would have held, and to direct the District Court to issue the requested writ of habeas corpus. Murdoch filed his original petition 11 years ago, in 1999. It was not until five years later that the Ninth Circuit originally remanded in *Murdoch I*. When Murdoch appealed again in 2005, it took another five years for the Ninth Circuit to deny relief in *Murdoch II*, to vacate that decision on petition for rehearing, and then to issue an *en banc* opinion revisiting and reversing *Murdoch I*.

The record is fully developed and establishes Murdoch's entitlement to long-delayed relief. *Davis* held that the accused's lost opportunity to use evidence of a juvenile criminal record to impeach his accuser's general credibility was "'constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.'" 415 U.S. at 318 (quoting *Smith*, 390 U.S. at 131 (quoting *Brookhart v. Janis*, 384 U.S. 1, 3, 86 S. Ct. 1245, 16 L. Ed. 2d 314 (1966))). *Smith* found such "first magnitude" error where a trial court barred cross-examination regarding the accuser's real name. 390 U.S. at 131. "The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." *Van Arsdall*, 475 U.S. at 684 (error not harmless where court prohibited cross-examination regarding dismissal of public drunkenness charge).

This case involves even starker prejudicial error, with the prohibited examination involving a letter directly contradicting the chief accuser's inculpatory testimony. The District Court determined in this case that the error was harmless because the privileged letter was not credible and contrary to the testimony of some of Murdoch's own witnesses. It further noted, as did the Ninth Circuit plurality, that Murdoch had the opportunity to cross-examine Dinardo's account of the crime, even though Murdoch could not ask whether Dinardo previously gave a different account.

These holdings miss that "forcing a witness to confront and explain his prior statements that contradict his testimony is the gold standard for effective cross-examination." App. 46 (Kozinski, C.J., dissenting) (collecting authorities). Even accepting for the sake of argument that the privileged letter was not credible, the letter still opened the door for the classic impeachment of "Were you lying then, or are you lying now?"

There is no dispute that Dinardo was a key witness against Murdoch. App. 5-6. The forensic evidence implicated Dinardo, not Murdoch. App. 4. One eyewitness, the bartender, identified Murdoch, but that identification came 11 years after the crime. App. 7.

It was one thing for Dinardo to admit on the stand that he would have done "whatever it took" to reduce his sentence, and that he had previously lied to protect himself. But it would have been another thing entirely for Murdoch to confront Dinardo with a prior statement that Dinardo was coerced into identifying Murdoch. App. 5, 25.

At best, the State has arguments for why the letter would not have doomed its case against Murdoch. But that speculation cannot establish harmlessness beyond reasonable doubt, particularly not as this Court has applied that standard in *Davis*, *Smith*, and *Van Arsdall*.

Murdoch is serving a life sentence, without possibility of parole, after the Superior Court allowed him to confront his accuser only with one hand tied behind his back. Murdoch asks the Court

to reverse the judgment of the Ninth Circuit and to direct the issuance of a writ of habeas corpus.

CONCLUSION

The Court should grant this petition for certiorari and vacate or reverse the judgment of the Ninth Circuit.

Respectfully submitted:

STEVEN M. KLEPPER*
KRAMON & GRAHAM, P.A.
ONE SOUTH STREET, STE. 2600
BALTIMORE, MARYLAND 21202
(410) 752-6030
sklepper@kg-law.com
* *Counsel of Record*

SEYMOUR I. AMSTER
LAW OFFICES OF SEYMOUR I. AMSTER
6320 VAN NUYS BOULEVARD, STE. 300
VAN NUYS, CALIFORNIA 91401
(818) 947-0104
AttyAmster@aol.com

COUNSEL FOR PETITIONER

APPENDIX TABLE OF CONTENTS

Page

United States Court of Appeals for the Ninth Circuit, Plurality Opinion (Tashima, J.), dated June 21, 2010 ..... App. 1

United States Court of Appeals for the Ninth Circuit, Concurring Opinion (Silverman, J.), dated June 21, 2010..... App. 29

United States Court of Appeals for the Ninth Circuit, Dissenting Opinion (Kozinski, C.J.), dated June 21, 2010..... App. 31

United States Court of Appeals for the Ninth Circuit, Dissenting Opinion (Thomas, J.), dated June 21, 2010..... App. 68

United States District Court for the Central District of California, Report and Recommendation, dated March 7, 2005 ..... App. 69

United States District Court for the Central District of California, Order Adopting Report and Recommendation, dated April 7, 2005..... App. 96

Court of Appeal of the State of California, Opinion, dated March 26, 1998 ..... App. 98

Supreme Court of California, Order, dated July 8, 1998 ..... App. 135

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES FRANKLIN MURDOCH, JR., *Petitioner-Appellant*, v. ROY CASTRO, Warden; EDMUND BROWN, JR.,* Attorney General of the State of California, *Respondents-Appellees.*	No. 05-55665 D.C. No. CV 99-06900 RSWL OPINION

Appeal from the United States District Court
for the Central District of California
Ronald S.W. Lew, District Judge, Presiding

Argued and Submitted
March 24, 2009 – San Francisco, California

Filed June 21, 2010

Before: Alex Kozinski, Chief Judge, Andrew J. Kleinfeld,A. Wallace Tashima, Sidney R. Thomas, Barry G. Silverman, M. Margaret McKeown, Kim McLane Wardlaw, William A. Fletcher, Consuelo M. Callahan, Sandra S. Ikuta, and N. Randy Smith, Circuit Judges.

Opinion by Judge Tashima;
Concurrence by Judge Silverman;
Dissent by Chief Judge Kozinski;
Dissent by Judge Thomas

*Edmund Brown, Jr., is substituted for his predecessor, Bill Lockyer, as Attorney General of the State of California. Fed.R.App.P. 43(c)(2).

COUNSEL

Seymour I. Amster, Van Nuys, California, for the petitioner-appellant.

Rama R. Maline, Deputy Attorney General, Los Angeles, California, for the respondents-appellees.

OPINION

TASHIMA, Circuit Judge:

Charles Murdoch was convicted of murder in California state court. Before trial, the prosecutor informed the court that a prosecution witness and participant in the crime had written a letter to his attorney claiming that Murdoch was not involved in the crime and that the witness had been coerced into implicating Murdoch. The state court ruled that Murdoch could not have access to the letter because it was protected under California's attorney-client privilege. In order to determine whether Murdoch is entitled to habeas relief, we must decide whether, under "clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), the Confrontation Clause of the Sixth Amendment of the United States Constitution[1] compelled the release of the letter to Murdoch in spite of the attorney-client privilege.

I. BACKGROUND[2]

On May 17, 1983, four men robbed the Horseshoe Bar in Long Beach, California. During the course of the robbery, one bystander was shot and

---

[1] "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. Amend. VI.

[2] The factual and procedural summary is taken largely from *Murdoch v. Castro*, 489 F.3d 1063, 1064-67 (9th Cir. 2007) ("*Murdoch II*").

killed; another was stabbed and severely wounded. The men recovered approximately $200 from the cash register and left behind a fingerprint. The crime went unsolved until 11 years later, when advances in fingerprint technology enabled police to identify Dino Dinardo as one of the perpetrators.

Officers arrested Dinardo on June 30, 1994, in Berkeley, California. When first questioned, Dinardo denied any involvement in the crime, but later recanted, admitting his involvement in the robbery, and identifying Murdoch as one of his accomplices. Both Dinardo and Murdoch were charged with murder accompanied by special circumstances.
Dinardo was tried first. At a suppression hearing that preceded his trial, Dinardo testified that his confession to the Long Beach police had been coerced, and that he had given the confession in exchange for a promise that he would be released to see his wife and daughter. Dinardo was convicted and was sentenced to 25 years' to life imprisonment. At sentencing, the judge said to Dinardo:

> I would like to do something different, Mr. Dinardo. You've probably been told it's a set sentence. I have to give it. The only thing I can say is I have 90 days to change the sentence if anything changes in the way of your mind or the District Attorney's mind insofar as trying to resolve this with something less than the set sentence.

> Frankly, from the standpoint of the other trial, unless the District Attorney has something more, I just wonder without your assistance where they're going; but maybe sometimes cases develop at the last minute. But, to my knowledge, I don't know of any other evidence. They have a very difficult case without your assistance.
>
> But that's actually between attorneys, and it's not the judge's province.
>
> I was hoping there would be a resolution so that I could sentence you to something less, which I would prefer to do from everything about this case, especially the length of time and all the years that you lived what appears to be a law-abiding life before you got arrested.

Dinardo subsequently did testify and, in return, received a reduction of his conviction to voluntary manslaughter and a reduced sentence of 12 years' imprisonment.[3] Dinardo was a key witness

---

[3] The dissent states that "[f]or a judge to goad someone he's just given a life sentence into helping the prosecution by promising to give him his life back, but only if he helps finger the defendant, is judicial extortion." Diss. op. at 9046. What the Chief Judge harshly labels as "judicial extortion" has long been a part of our criminal justice system. *See, e.g.*, U.S.S.G. § 5K1.1 (providing for a downward sentencing departure for

at Murdoch's trial. He testified that, in 1983, Murdoch had approached him "to do a job" and that the two of them, together with two other men, robbed the Horseshoe Bar. According to Dinardo, when Murdoch entered the bar, Murdoch carried a

---

substantial assistance in the prosecution of another person); 18 U.S.C. § 3553(f)(5) (providing that a "safety harbor" sentence below a statutory minimum is available only if, *inter alia*, the sentencing court finds that the defendant has fully cooperated with the Government). Perhaps the most famous example of such judicial "goading" or "extortion" is that of Chief Judge Sirica in the *Watergate* trial. There, as reported by *Time* magazine in its 1973 man-of-the-year story, Judge Sirica "kept the pressure on the other convicted conspirators to talk too by giving them harsh provisional sentences ranging up to 40 years. . . . He promised to review the sentences later and said that the final sentencing 'would depend on your full cooperation with the grand jury and the Senate Select Committee.' " *Available at* http://www.time.com/subscriber/personoftheyear/archive/stories/973.html (last visited May 15, 2010).

The dissent characterizes Judge Sirica's conduct of the *Watergate* trial as "unconscionable" and "a blemish on the reputation of the federal courts . . . ." Diss op. at 9046 n.*. The D.C. Circuit, sitting en banc, however, did not express the same, harsh view. It not only affirmed Judge Sirica's conduct, but lauded it in the face of charges that he conducted the trial and sentencing in an inquisitorial manner. *See United States v. McCord*, 509 F.2d 334, 347 (D.C. Cir. 1974) (en banc) ("The judge, like the prosecutor in this respect, is not a passive by-stander in the arena of justice, a spectator at a 'sporting event,' rather he or she has the most pressing affirmative responsibility to see that justice is done in every case." (footnotes omitted)), *cert. denied*, 421 U.S. 930 (1975); *see also United States v. Liddy*, 509 F.2d 428, 442 (D.C. Cir. 1974) ("Judge Sirica's palpable search for truth in such a trial was not only permissible, it was in the highest tradition of his office as a federal judge.").

.22 caliber rifle and announced loudly, "Don't nobody move. This is a stick-up." Dinardo took this as his cue to empty the cash register. He fumbled with the buttons on the register, heard a gunshot, emptied the register, and ran out the back door, joining the other two men in the getaway car, with Murdoch joining them about a minute later. He recalled seeing Murdoch in possession of the rifle both in the bar and in the car. Dinardo testified that the first time he learned that someone had been shot in the robbery was the day of his arrest, 11 years after the crime.

During Murdoch's trial, Murdoch's attorney, Dinardo's attorney, the prosecutor, and the presiding judge discussed a letter from Dinardo addressed to his then counsel. The letter was first brought to the court's attention by the prosecutor, who indicated that in her interviews of Dinardo, he told her of the existence of a letter in which he, Dinardo, stated that he was coerced by the police into implicating Murdoch in the crime. Dinardo's new counsel asserted the attorney-client privilege and work-product doctrine as grounds for refusing to disclose the letter. The court concluded that Dinardo's letter to Dinardo's former counsel, who was still representing Dinardo when the letter was written, was protected by the attorney-client privilege and thus could not be used, on cross-examination, to impeach Dinardo.

Although Dinardo was not cross-examined about the letter, Murdoch's counsel succeeded in

eliciting testimony that challenged Dinardo's credibility as a witness. Dinardo testified that he had been convicted of the same murder for which Murdoch was now being tried and that by testifying in Murdoch's trial, he would "get out in about five years" rather than 21 or more years. He admitted that when he was initially questioned by the police, he had lied and denied that he had ever been inside the Horseshoe Bar. He admitted that he would have done "whatever it took" to get out of custody and be reunited with his daughter. He also testified to convictions for grand theft in 1982 and petty theft in 1984. On re-direct examination by the prosecutor, Dinardo testified that during the police questioning, he named a "Charles or Chuck" as someone else involved in the crime, but he could not remember the last name. He was shown photographs at the end of the interview, and he identified Murdoch as one of his accomplices. On re-cross, he stated that he had testified in his own trial that his confession had been coerced. He also admitted that, had the fingerprints not identified him as one of the robbers, he would have continued to lie to the police about his involvement.

In addition to Dinardo, other witnesses from the Horeshoe Bar testified and provided in-court identification of Murdoch. The bartender, Dyanne Spence, described looking into Murdoch's eyes down the barrel of a rifle pointed at her face. "He's been scaring me for years," she said. She also testified that she had identified Murdoch at a live lineup at the county jail in 1994 and that she was sure

"beyond a shadow of a doubt" that Murdoch had committed the crime.

Murdoch was convicted of first-degree murder with a robbery-murder special circumstance, and sentenced to life imprisonment without parole. The California Court of Appeal affirmed the conviction, and denied Murdoch's petition for a writ of habeas corpus. The California Supreme Court denied Murdoch's petition for review.

Murdoch then filed a federal petition for a writ of habeas corpus, which the district court dismissed. On Murdoch's first appeal, we vacated the order denying Murdoch's habeas petition and remanded the case to the district court stating:

> Today, we address a situation where a substantial showing has been made that, depending upon the content of Dinardo's letter, the Confrontation Clause and attorney-client privilege are potentially at odds —a set of facts the Supreme Court has not yet examined. Its precedents, however, clearly provide that evidentiary privileges or other state laws must yield if necessary to ensure the level of cross-examination demanded by the Sixth Amendment.

Murdoch v. Castro, 365 F.3d 699, 702 (9th Cir. 2004) ("*Murdoch I*"). We concluded that if the contents of Dinardo's letter "are as generally described by the prosecutor and as Murdoch believes," then Murdoch "has arguably met his burden" of showing that the jury might have received a significantly different impression of the witness' credibility had Murdoch been able to pursue his proposed line of cross-examination. *Id.* at 705. General impeachment for bias implicated Dinardo's reliability to a lesser extent than actual statements inconsistent with his testimony, such as those which the letter purportedly contained. *Id.* Without knowing the contents of the letter, however, we could not make a determination of whether Murdoch's confrontation rights had been violated. We accordingly remanded the case to the district court with instructions that the court obtain the letter, inspect it in camera, and determine whether the state court's decision to deny Murdoch access to the letter violated Murdoch's Sixth Amendment right of confrontation. *Id.* at 706.

On remand, the magistrate judge, in his report and recommendation, began from the premise that "[e]ssentially, the Ninth Circuit held that the attorney-client privilege might have to yield in a particular case if the right of confrontation would be violated by enforcing the privilege." The report concluded that, although the state courts had read the contents of the letter, their decisions were "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by

the Supreme Court of the United States," within the meaning of 28 U.S.C. § 2254(d)(1), in that they failed to perform any balancing of Murdoch's Sixth Amendment rights against the privilege.

Nevertheless, the report found that there was no constitutional violation because the letter's intrinsic probative value was low, given that, of the four factual assertions in the letter, "trial testimony rebutted the first three, and half of the fourth." The magistrate judge summarized the contents of the letter as asserting the following facts: (1) After Dinardo's arrest in Berkeley, Long Beach Police Detective Pavek coerced a statement from Dinardo by promising not to charge Dinardo in exchange for Dinardo's statement; (2) In his statement, Dinardo was forced to identify petitioner Murdoch as a participant in the crime; (3) Dinardo does not actually know Murdoch, although Dinardo is acquainted with Murdoch's brother; and (4) Murdoch and Dinardo did not commit any crime.

Because the factual assertions in the letter had been "contradicted by trial testimony" or "were demonstrably false in the light of other testimony," the magistrate judge found that the "intrinsic probative value of the letter was and is low." Thus, the exclusion of the letter from evidence did not substantially diminish Murdoch's right to effective cross-examination. The magistrate judge also concluded that the decision to exclude the letter was subject to harmless error analysis, and, further concluded, under the *Brecht v. Abrahamson*

standard, 507 U.S. 619, 637 (1993), that there was no "grave doubt" as to whether the jury would have reached a different result had the letter been admitted. While acknowledging that "Dinardo's testimony was crucial," the magistrate judge found that "Dinardo's prior inconsistent statement was inextricably linked with other statements which either conflicted with other evidence or were demonstrably false." Therefore, he concluded that any error resulting from the exclusion of the letter was harmless. The district court adopted the magistrate judge's findings and recommendation and denied Murdoch's habeas petition.

On Murdoch's second appeal, a divided three-judge panel affirmed the district court's denial of habeas relief in *Murdoch II*, 489 F.3d 1063. The majority pointed out that it was bound under the "law of the case" doctrine by the *Murdoch I* court's holding that, "under the right set of facts, Supreme Court precedent suggests the Sixth Amendment right to confrontation could support admission of the letter, even against a valid claim of attorney-client privilege." *Id.* at 1068. Although the *Murdoch I* court had not explicitly held that it was clearly established under Supreme Court law that the Confrontation Clause might support the introduction of the letter as evidence, the majority in *Murdoch II* interpreted this as a necessary implication of *Murdoch I* that was binding on the panel as the law of the case. *Id.* at 1068 & n.2. The panel then held that Murdoch was able to cross-examine Dinardo effectively in spite of not having access to the letter, and that

therefore the Sixth Amendment did not require that the letter be released to him. *Id.* at 1069-70.

Judge Bright[4] dissented from the panel's decision. He believed that access to the letter would have allowed Murdoch to impeach Dinardo's testimony much more effectively than was possible without the letter, and that, on the basis of *Murdoch I*, habeas relief should have been granted. *Id.* at 1070-72 (Bright, J., dissenting).

We granted Murdoch's petition for rehearing en banc.[5] *Murdoch v. Castro*, 546 F.3d 1051 (9th Cir. 2008).

II. JURISDICTION AND STANDARD OF REVIEW

We review de novo the district court's denial of a § 2254 habeas petition. *Tilcock v. Budge*, 538 F.3d 1138, 1143 (9th Cir. 2008). Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a habeas petition challenging a state court conviction will not be granted unless the decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. §

---

[4] The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation, was a member of the *Murdoch II* panel.

[5] The en banc court ordered supplemental briefing on the question of whether the court should reconsider its decision in *Murdoch I*.

2254(d)(1). Here, AEDPA applies because the state court denied Murdoch's claim "on the merits," rather than on a procedural or other ground. 28 U.S.C. § 2254(d)(1); *see Lambert v. Blodgett*, 393 F.3d 943, 969 (9th Cir. 2004); *Reynoso v. Giurbino*, 462 F.3d 1099, 1109 (9th Cir. 2006) (assuming, unless it is otherwise "clear," that a state court has decided all the issues presented); *Hunter v. Aispuro*, 982 F.2d 344, 346-48 (9th Cir. 1992) (presuming denial of habeas relief is on the merits, not procedural grounds, unless the decision supports the opposite conclusion). Under § 2254(d), we cannot grant the writ unless the state court's decision (denying Murdoch's claim) is objectively unreasonable. *See Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2000); *Pirtle v. Morgan*, 313 F.3d 1160, 1165, 1169 (9th Cir. 2002).

III. DISCUSSION

[1] The Confrontation Clause of the Sixth Amendment guarantees a defendant in a criminal case an opportunity for effective cross-examination of the witnesses against him. *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). In *Murdoch I*, we implicitly held that it was clearly established by the Supreme Court that this right could, in some circumstances, be violated by the failure to produce a document that was otherwise protected by the attorney-client privilege. 365 F.3d at 705-06. The three-judge panel in *Murdoch II* was bound under the "law of the case" doctrine by *Murdoch I*'s holding. *See Murdoch II*, 489 F.3d at 1067-68. This

restriction, however, does not apply to the en banc court. *See Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 995 (9th Cir. 2003) (en banc). The question we must now confront, therefore, is whether *Murdoch I* was correct in holding that it is clearly established by Supreme Court precedent that the Sixth Amendment right to confrontation in some situations trumps the attorney-client privilege.

A

The Supreme Court has restricted "clearly established Federal law" under § 2254(d)(1) to " 'the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision.' " *Carey v. Musladin*, 549 U.S. 70, 74 (2006) ("*Musladin II*") (quoting *Williams v. Taylor*, 529 U.S. 362, 412 (2000)). A state court's decision is contrary to clearly established law when it either "applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases" or "confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." *Williams*, 529 U.S. at 405-406. A state court unreasonably applies clearly established law when it "identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003) (quoting *Williams*, 529 U.S. at 413). To be an unreasonable application, the state court decision "must be objectively unreasonable," not just incorrect or erroneous. *Id.* at 75-76. Habeas

relief for an unreasonable application of law can be "based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced. *Id.* at 76.[6] Habeas relief for an unreasonable application of law can be "based on an application of a governing legal principle to a set of facts different from those of

---

[6] The California Court of Appeal, which rendered the last reasoned state court decision in this case, addressed Murdoch's Confrontation Clause argument only obliquely. It did not mention the Confrontation Clause in its opinion, but it did discuss and quote from the section of Murdoch's brief in which he raised the issue. The court also quoted from *People v. Godlewski*, 21 Cal. Rptr. 2d 796, 800 (Ct. App. 1993), a case that dealt with the tension between the attorney-client privilege and the Confrontation Clause. Whether the state court adequately responded to Murdoch's Confrontation Clause argument, however, is irrelevant. Even when there is no reasoned state court opinion explaining the denial of a defendant's claim in any respect, we "must assume that the state court has decided all the issues and 'perform an independent review of the record to ascertain whether the state court decision was objectively reasonable.' " *Reynoso*, 461 F.3d at 1109 (quoting *Pham v. Terhune*, 400 F.3d 740, 742 (9th Cir. 2005) (per curiam)) (internal quotation marks omitted). Thus we do not review Murdoch's claim de novo, as we would if the state court had clearly indicated that it had not reached the merits of Murdoch's claim. *See id.*; *Pirtle*, 313 F.3d at 1167.

The dissent refuses to accept these established principles of AEDPA review. Instead, it spends several pages discussing the state appellate court's duty under state law to "analyze[ ] . . . [each] contention" and convinces itself that the state court erroneously "decline[d] to reach [the] issue" and "overlooked" it. *See* Diss. op. at 9050-52. But whether we review a claim de novo under the AEDPA is a question of federal law and, on that question, as explained above, we are bound by *Reynoso* and *Pirtle*.

the case in which the principle was announced." *Id.*; *accord Panetti v. Quarterman*, 127 S. Ct. 2842, 2858 (2007), but only when the principle "clearly extend[s]" to the new set of facts. *Wright v. Van Patten*, 128 S. Ct. 743, 745 (2008) (per curiam).

A review of the Supreme Court's recent case law on this subject suggests that, when a state court may draw a principled distinction between the case before it and Supreme Court caselaw, the law is not clearly established for the state-court case. In *Musladin II*, 549 U.S. at 77, the Supreme Court vacated a decision of this court, *Musladin v. Lamarque*, 427 F.3d 653, 661 (9th Cir. 2005) ("*Musladin I*"), in which this court held that the state court unreasonably applied clearly established federal law by allowing the victim's family members, in a murder trial, to wear buttons depicting the victim while in the presence of the jury.

In support of our decision in *Musladin I*, we relied primarily on two Supreme Court cases: *Estelle v. Williams*, 425 U.S. 501 (1976), and *Holbrook v. Flynn*, 475 U.S. 560 (1986). In *Williams*, the Court noted that, when a defendant appears before the jury in prison garb, "[t]he defendant's clothing is so likely to be a continuing influence throughout the trial that . . . an unacceptable risk is presented of impermissible factors coming into play." 425 U.S. at 505. Thus, a defendant's right to a fair trial is violated if he is required to appear in the presence of the jury in such attire. *Id.* at 505-06. The Court reaffirmed this basic position in *Flynn*, but held that

the presence of extra security personnel in the courtroom during trial did not necessarily violate the defendant's Sixth and Fourteenth Amendment rights because, unlike the situation described in *Williams*, it was not "inherently prejudicial." *Flynn*, 475 U.S. at 569. Although the presence of additional security in the courtroom might violate a defendant's right to a fair trial in a particular case, Flynn's trial, in which four uniformed state troopers sat silently in the first row of the spectator section, did not present such a case. *Id.* at 569-72. In *Musladin I*, we held that the presence of the victim's family in the courtroom while wearing buttons was inherently prejudicial, and was an unreasonable application of the test described in *Williams* and *Flynn*. *Musladin I*, 427 F.3d at 658-61.

When the Supreme Court vacated our grant of habeas relief in *Musladin I*, it pointed out that "[b]oth *Williams* and *Flynn* dealt with government-sponsored practices." *Musladin II*, 549 U.S. at 75. No Supreme Court case had applied *Williams* and *Flynn* to courtroom conduct by private actors, and, because part of the test established in *Williams* and *Flynn* asked "whether the [allegedly prejudicial] practices furthered an essential *state* interest," it was not clearly established that the test would apply to actions by private actors. *Id.* at 76. The Court summarized its reasoning as follows:

> Given the lack of holdings from this Court regarding the potentially prejudicial effect of spectators'

> courtroom conduct of the kind involved here, it cannot be said that the state court "unreasonabl[y] appli[ed] clearly established Federal law." § 2254(d)(1). No holding of this Court required the California Court of Appeal to apply the test of *Williams* and *Flynn* to the spectators' conduct here. Therefore, the state court's decision was not contrary to or an unreasonable application of clearly established federal law.

Id. at 77 (emendations in original).

Similarly, in *Van Patten*, the Court held that it was not clearly established that a defendant received ineffective assistance of counsel if his lawyer represented him via speakerphone, rather than by being physically present in the courtroom. 128 S. Ct. at 746-47. The Seventh Circuit had granted habeas relief on the basis of *United States v. Cronic*, 466 U.S. 648 (1984), which held that in certain circumstances a defendant need not prove that he was actually prejudiced by his attorney's conduct. The logic of *Cronic* is that, in some situations, "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *Id.* at 659-60. One situation in which *Cronic* applies is when "counsel [is] either totally absent, or prevented from assisting

the accused during a critical stage of the proceeding." *Id.* at 659 n.25. The Court reversed the Seventh Circuit because *Cronic* did not clearly apply to the facts at hand. *Van Patten*, 128 S. Ct. at 746. Although an attorney who participated in a hearing telephonically might not do as well as one who was physically present in the courtroom, the state court could reasonably believe that the attorney's performance would not be so poor as to justify relief without showing prejudice: "Our cases provide no categorical answer to this question." *Id.*

In *Panetti*, 127 S. Ct. 2842, by contrast, there was no principled way to apply the Court's precedent to a somewhat new factual situation and reach the state court's result; thus, the Court granted habeas relief. *Panetti* concerned the pending execution of person with a history of mental illness. 127 S. Ct. 2848-49. The Court identified the controlling legal principle as the holding of *Ford v. Wainwright*, 477 U.S. 399 (1986), which required that a prisoner who has made "a substantial threshold showing of insanity" be given a competency hearing before being subject to execution. *Id.* at 426 (Powell, J., concurring in part and concurring in the judgment).[7] The Court held that it was clearly established that *Ford* required a competency hearing with procedural protections for the prisoner, even though the standard in *Ford* was stated in general terms and

---

[7] Because Justice Powell's opinion represented the narrowest ground on which five Justices agreed, the *Panetti* court recognized it as the controlling opinion. 127 S. Ct. at 2856.

the facts were not identical to those with which it was now faced. *Panetti*, 127 S. Ct. at 2858-59. There was no reasonable way to apply *Ford* that would not reach this result, and thus the state court had unreasonably applied the law when it failed to provide Panetti with a proper competency hearing. *Id.* at 2858.

[2] The common thread in all these cases is that when there is a principled reason for the state court to distinguish between the case before it and Supreme Court precedent, the state court's decision will not be an unreasonable application of clearly established Supreme Court law. As we stated in *Moses v. Payne*, 555 F.3d 742 (9th Cir. 2009):

> [W]hen a Supreme Court decision does not "squarely address[ ] the issue in th[e] case" or establish a legal principle that "clearly extend[s]" to a new context to the extent required by the Supreme Court in these recent decisions, it cannot be said, under AEDPA, there is "clearly established" Supreme Court precedent addressing the issue before us, and so we must defer to the state court's decision.

Id. at 754 (emendations in original) (quoting *Van Patten*, 128 S. Ct. at 746, 745).

[3] The Supreme Court has examined the potential conflicts between the Confrontation Clause

and other rights and privileges, including the marital privilege, *Crawford v. Washington*, 541 U.S. 36 (2004),[8] the Fifth Amendment privilege against self-incrimination, *Douglas v. Alabama*, 380 U.S. 415 (1965), and the state's interest in the confidentiality of adjudications of juvenile delinquency, *Davis v. Alaska*, 415 U.S. 308 (1974). But no Supreme Court case has directly addressed the potential conflict between state-law attorney-client privilege and the Confrontation Clause, as we acknowledged in *Murdoch I*, 365 F.3d at 702 ("Today, we address a situation where a substantial showing has been made that, depending upon the content of Dinardo's letter, the Confrontation Clause and attorney-client privilege are potentially at odds—*a set of facts the Supreme Court has not yet examined.*") (emphasis added). Indeed, in a case involving the attorney-client privilege, the Supreme Court has expressly stated that it would not consider the question whether the attorney-client privilege might yield in the face of constitutional rights. *Swidler & Berlin v. United States*, 524 U.S. 399, 408 n.3 (1998).

In *Swidler*, the Supreme Court addressed the scope of the attorney-client privilege -- specifically, "the extent to which the privilege survives the death of the client." *Id.* at 403. The Independent Counsel

---

[8] *Crawford* was decided after Murdoch's conviction became final and does not apply retroactively on collateral review. *See Whorton v. Brockting*, 549 U.S. 406 (2007). Thus, whether the Supreme Court in *Crawford* explained "what the Sixth Amendment was supposed to prevent," Diss. op. at 9056, is irrelevant to our review under the AEDPA.

sought notes taken by an attorney during a meeting with his client, former Deputy White House Counsel Vincent Foster. Foster sought legal representation, but, shortly after the meeting, he committed suicide. *Id.* at 401-02. The Independent Counsel argued that "the attorney-client privilege should not prevent disclosure of confidential communications where the client has died and the information is relevant to a criminal proceeding." *Id.* at 403.

The Court began by discussing the purpose of the privilege, "to encourage 'full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.' " *Id.* (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)). The Independent Counsel analogized the situation to the testamentary exception to the attorney-client privilege, arguing that "in criminal proceedings, the interest in determining whether a crime has been committed should trump client confidentiality." *Id.* at 406. The Court disagreed, stating that, unlike with the testamentary exception, "[t]here is no reason to suppose as a general matter that grand jury testimony about confidential communications furthers the client's intent." *Id.* As pertinent here, the Court further reasoned that "there is no case authority for the proposition that the privilege applies differently in criminal and civil cases." *Id.* at 408-09. Significantly, the Court noted that, "Petitioners, while opposing wholesale abrogation of the privilege in criminal cases, concede that

exceptional circumstances implicating a criminal defendant's constitutional rights might warrant breaching the privilege," but the Court stated that "*[w]e do not . . . need to reach this issue*, since such exceptional circumstances clearly are not presented here." *Id.* at 408 n.3 (emphasis added).

[4] The Supreme Court accordingly has explicitly stated that it was not deciding whether the attorney-client privilege might have to yield to a criminal defendant's constitutional rights. We have held that a constitutional principle is not clearly established for purposes of § 2254 where the Supreme Court has expressly concluded that an issue is an "open question." *Earp v. Ornoski*, 431 F.3d 1158, 1185 (9th Cir. 2005); *see also Mejia v. Garcia*, 534 F.3d 1036, 1046 (9th Cir. 2008) (holding that the Supreme Court had not clearly established, for purposes of § 2254, that the admission of propensity evidence in that case was unconstitutional because the Supreme Court had expressed no opinion on the issue and the petitioner accordingly could "point to no Supreme Court precedent" establishing the constitutional right); *Larson v. Palmateer*, 515 F.3d 1057, 1066 (9th Cir. 2008) ("Because the Court has expressly left this issue an open question, the state court did not unreasonably apply clearly established federal law in determining that the admission of evidence of Larson's criminal history did not violate due process." (internal quotation marks omitted)).

The Eighth Circuit has relied on the Supreme Court's express reservation of the issue in *Swidler* to hold that the issue is not clearly established for purposes of § 2254. In *Newton v. Kemna*, 354 F.3d 776 (8th Cir. 2004), the state trial court denied the defendant's motion to produce the only eyewitness' medical records. The Eighth Circuit "note[d] that the Supreme Court has recognized in other circumstances that constitutional rights can trump evidentiary privileges," citing *Davis* and *Swidler*. *Id.* at 781. The court stated, however, that *Swidler* "expressly left open the question of whether a criminal defendant's constitutional rights might overcome the attorney-client privilege," and therefore concluded that the Supreme Court had not clearly established whether a state's "physician-patient privilege must give way to a defendant's desire to use psychiatric records in cross-examination." *Id.* at 781, 782; *see also Johnson v. Norris*, 537 F.3d 840, 846-47 (8th Cir. 2008) (discussing *Newton* and *Swidler* and concluding that, although *Davis* and *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), "establish that in at least some circumstances, an accused's constitutional rights are paramount to a State's interest in protecting confidential information," those cases "do not establish a specific legal rule that answers whether a State's psychotherapist-patient privilege must yield to an accused's desire to use confidential information in defense of a criminal case"). As the Eighth Circuit reasoned in *Newton*, "[g]iven the restrictive nature of habeas review, it is not our province to speculate as to whether the Supreme Court, if faced with the

issue, would find that [a state's] physician-patient privilege must give way to a defendant's desire to use [privileged material] in cross-examination." *Newton*, 354 F.3d at 782.

It is not mere formalism to distinguish between attorney-client privilege and other rights and privileges the Court has dealt with in its Confrontation Clause jurisprudence. The attorney-client privilege is, after all, "one of the oldest recognized privileges for confidential communications," *Swidler*, 524 U.S. at 403. The Supreme Court might well decide that it is worthy of greater protection than the marital privilege, *see Crawford v. Washington*, 541 U.S. 36, or the confidentiality of juvenile delinquency proceedings, *see Davis v. Alaska*, 415 U.S. 308. In addition, the Court might be more likely to protect documents subject to attorney-client privilege because it is easier to maintain such protection without eliminating the defendant's ability effectively to cross-examine a witness. Because the attorney-client privilege protects only a communication between an attorney and a client, not the facts that are communicated, a defendant would remain free to question the witness about the underlying facts, just as happened here. Despite not having access to the letter, Murdoch was able to cross-examine Dinardo on a wide range of subjects, including Dinardo's earlier denial of involvement in the murder. As the Supreme Court has explained, the attorney-client privilege does not "create a broad 'zone of silence' over" the subject matter of the communication. "The

privilege only protects disclosure of [the] communications [themselves]; it does not protect disclosure of the underlying facts," so long as the underlying facts can be proven without resort to the privileged materials. *Upjohn*, 449 U.S. at 395.

In *Crawford*, by contrast, the marital privilege prevented the defendant from cross-examining the witness at all. *See* 541 U.S. at 40. The same was true in *Douglas v. Alabama*, 380 U.S. at 416-17, when the witness asserted his Fifth Amendment privilege against self-incrimination.

[5] We acknowledge the possibility that the Supreme Court may in the future well decide that the Confrontation Clause in some cases requires the disclosure of documents that are subject to the attorney-client privilege. But under the highly deferential standard established by AEDPA and the Supreme Court, as long as the state court could have found a principled reason not to apply the Court's precedents to the current case, we may not grant habeas relief. As was the case in *Musladin II*, 549 U.S. at 77, "[n]o holding of th[e Supreme] Court required the California Court of Appeal to apply" cases such as *Douglas* and *Davis* to Murdoch. The relationship between the Confrontation Clause and the attorney-client privilege has not been clearly established by the Supreme Court; as a result, we cannot say that the California court unreasonably

applied clearly established Supreme Court law to Murdoch's case.[9]

IV. CONCLUSION

[6] Because the Supreme Court has not clearly established whether and in what circumstances the attorney-client privilege must give way in order to protect a defendant's Sixth Amendment confrontation rights, the California state court could not have unreasonably applied clearly established Supreme Court law when it denied Murdoch access to the letter. *See Musladin II*, 549 U.S. at 77. To the extent that it holds to the contrary, *Murdoch I* is overruled.

For the reasons set forth above, the judgment of the district court is **AFFIRMED**.

---

[9] The concurrence faults Murdoch because his counsel "*only* sought disclosure of the letter Dinardo had written to his lawyer," and did not move to strike Dinardo's testimony. Concur. op. at 9044-45. It assumes that the *exclusive* procedure for preserving a Sixth Amendment confrontation claim is a motion to strike the challenged testimony, but cites no case so holding. Instead, the authorities on which Judge Silverman relies state only what is "ordinarily . . . appropriate," or that a defendant is "entitled" to have the testimony stricken, or what "many judges . . . agree." *Id.* at 9044-45. Because Judge Silverman agrees that Murdoch "unquestionably perfected his objection to the court's denial of the disclosure request," *id.* at 9045, we agree with Chief Judge Kozinski that, because "California is satisfied with the procedural posture of this case, [w]e are in no position to disagree." Diss. op. at 9067.

SILVERMAN, Circuit Judge, concurring:

This case is built on a false premise — that there was somehow a conflict between Dinardo's right to claim the attorney-client privilege under California law and Murdoch's federal constitutional right of confrontation. There was no conflict. The trial court could have sustained Dinardo's claim of privilege, and then having done so, stricken Dinardo's direct testimony on the ground that Murdoch could not be effectively cross-examined. This is a very common scenario when a witness testifies on direct but then cannot be cross-examined. *See Toolate v. Borg*, 828 F.2d 571, 572 (9th Cir. 1987) ("Ordinarily, when a testifying witness cannot or will not be cross-examined, the appropriate relief . . . is to strike the direct testimony of the witness and to instruct the jury to disregard it.") (internal quotation marks omitted); *United States v. Brown*, 634 F.2d 819, 824 (5th Cir. 1981) (stating that while "it is by no means clear that the appropriate resolution to a conflict between [the confrontation] right and the marital privilege is the actual introduction of the testimony" a defendant is entitled "to strike that portion of the testimony of the witnesses against him with regard to which his right of confrontation is lost"); 1 Kenneth S. Broun, et al., *McCormick on Evidence* § 19 (6th ed. 2006) (stating that "many judges and writers" agree that excluding the direct testimony is the proper remedy when a witness cannot be properly cross-examined).

The problem is that Murdoch's counsel *only* sought disclosure of the letter Dinardo had written to his lawyer, deputy public defender Star. When the trial court sustained the claim of attorney-client privilege, that's where Murdoch's lawyer was content to leave it. His lawyer unquestionably perfected his objection to the court's denial of the disclosure request, but never sought to strike Dinardo's testimony. This is the remedy that the law provides in the case of a witness who cannot be cross-examined for *any* reason. If the direct testimony cannot be tested by cross-examination, it cannot stand and is stricken.

Had the trial court denied a motion to strike Dinardo's testimony, we would have a legitimate confrontation problem on our hands, but no such motion was ever made. Thus, it cannot be said that the state court denied Murdoch's confrontation right at all, much less that it acted unreasonably or contrary to clearly established Supreme Court law. In the absence of a constitutional violation, federal habeas corpus relief cannot be granted. 28 U.S.C. § 2254(a), (d).

For these reasons, I would affirm the denial of habeas relief.

Chief Judge KOZINSKI, dissenting, with whom Judges W. Fletcher and Wardlaw join, and Judges Thomas and McKeown join with respect to Parts 2 and 3:

If it wasn't for bad luck, Murdoch wouldn't have no luck at all. He's wakin' up this mornin' in jail when there's strong proof he ain't done nothing wrong. I would certainly defer to a jury's contrary verdict if it had seen this evidence and convicted Murdoch after a fair trial, presided over by a fair judge, followed by an appeal where the justices considered all of his constitutional claims. But Murdoch had none of these.

Start with the trial judge: He was so worried that the prosecution couldn't put on sufficient evidence to convict Murdoch that he sentenced Murdoch's alleged confederate (Dinardo) to life in prison, but promised to give him a big break if he testified against Murdoch. True to his word, right after Dinardo fingered Murdoch, and as Murdoch's jury was retiring to deliberate, the judge rewarded Dinardo by reducing his life sentence to a walk-away twelve years—or, as Dinardo himself estimated, actual time served of about five years.

Put yourself in Dinardo's shoes: You've just been sentenced to spend the rest of your days behind bars, never again to hold your infant daughter in your arms. But the judge immediately dangles the promise of leaving prison and resuming a normal life before she turns eight, if only you help nail Murdoch.

Prosecutors are known to offer defendants a break if they testify truthfully against a co-defendant. For a judge to goad someone he's just given a life sentence into helping the prosecution by promising to give him his life back, but only if he helps finger the defendant, is judicial extortion.* You'd have to be more than human not to do or say whatever it takes to grab that brass ring.

---

* I didn't coin the term; it comes from Philip Kurland, probably the preeminent constitutional scholar at the time of Watergate, who referred to Chief Judge Sirica's similar misconduct as "a form of extortion." Man of the Year: Judge John J. Sirica, *Time*, Jan. 7, 1974. James Fellers, then the ABA's President-Elect, likened Judge Sirica's treatment of the Watergate defendants to the "torture rack and the Spanish Inquisition." *Id.* Dean Monroe Freedman of Hofstra Law School argued that "Sirica deserves to be censured for becoming the prosecutor himself." *Id.*

Sirica's unconscionable conduct is a blemish on the reputation of the federal courts. While covering him with wet warm kisses as to his other questionable conduct, the D.C. Circuit stopped short of approving Sirica's blackjacking of the defendants. *United States* v. *McCord*, 509 F.2d 334, 346 n.35 (D.C. Cir. 1974) (en banc). No one, until today, has. Even the trial judge in Murdoch and Dinardo's cases recognized a judge shouldn't act this way. *See* p. 9063 *infra*. We've said as much in the past: "[J]udicial involvement in plea negotiations inevitably carries with it the high and unacceptable risk of coercing a defendant to accept the proposed agreement," and that "violate[s] a defendant's fundamental constitutional rights." *United States* v. *Bruce*, 976 F.2d 552, 556 (9th Cir. 1992). "[C]ourts must not use the sentencing power as a carrot and stick . . . and they must not create an appearance of such a practice." *United States* v. *Stockwell*, 472 F.2d 1186, 1187 (9th Cir. 1973). One wonders whether these cases survive today.

Not only did the trial judge strong-arm Dinardo into testifying, he prevented the defense from seeing—and so from using for cross-examination—a letter Dinardo had written a year earlier exculpating Murdoch and disclosing that the police had coerced Dinardo into making false accusations. The letter, written by Dinardo's own hand on notebook paper, is still under seal, protected by Dinardo's vestigial attorney-client privilege, but Judge Bright's reconstruction is a fair summary:

> I would like to make a statement about the facts surrounding my arrest for robbery and murder. I was taking care of my young daughter when Long Beach police arrested me at my home in Berkeley. Two policemen, Detective Pavek and his partner, took me to the Berkeley Police Department and interviewed me. I wanted to get back to my daughter as I worried about her welfare. At that time, Detective Pavek coerced a statement from me and promised not to charge me if I made a statement that Charles Murdoch participated in the crime. But, I do not actually know Mr. Murdoch, although I know his brother. Mr. Murdoch and I did not commit any crime.

Murdoch v. *Castro*, 489 F.3d 1063, 1071 (9th Cir. 2007) (Bright, J., dissenting).

This letter would have destroyed Dinardo as a witness, so the trial judge suppressed it. After all, what's the point of putting the screws on Dinardo only to have his testimony decimated by his contrary prior statement? So the defense never got to see the letter and the jury never heard of it, despite cases from the state court of appeal and the state supreme court squarely holding Murdoch was entitled to the letter.

You'd think that, with all that controlling authority on point, the state appellate court would have reversed the conviction. But you'd be wrong. Judges can only reverse a conviction if they consider the defendant's winning argument. Here, the court of appeal, for reasons that can be explained only one way, *see* pp. 9050-52 *infra*, did not. It's not like the court summarily affirmed the conviction; it spent thirty pages going over Murdoch's other arguments and knocking them down like bowling pins. But Murdoch's best argument—the one for which the government had *no* answer—the state appellate judges just skipped over as if he never made it. This is passing strange, but it's what happened.

Now, to complete Murdoch's run of ill luck, a plurality of our panel grants deference to a non-existent state-court "adjudication" of his winning claim and concludes that the state courts were not unreasonable in holding what they in fact never held. And, even though a majority of the en banc panel agrees that Murdoch was denied his right to confrontation, our concurring colleague denies relief

based on a procedural default argument that the state has never made. If everybody went to heaven, I do believe poor Murdoch would miss the call.

1. AEDPA Deference. The plurality holds that the state courts adjudicated Murdoch's Confrontation Clause claim on the merits, so we must defer under AEDPA. Pl. op. 9032-33 & n.5. That's contrary to the facts, because the last reasoned decision of the state courts contains not a single word about the Confrontation Clause; it's contrary to the concerns of comity and federalism that motivated AEDPA, because the state courts have interpreted the Confrontation Clause as Murdoch suggests; and it's contrary to the very essence of habeas review, because no court will ever actually decide Murdoch's constitutional claim on the merits (unless lightning strikes and the Supreme Court intervenes).

a. Murdoch argued to the state courts that his Sixth Amendment right to confrontation was violated when Dinardo was allowed to testify, but could not be cross-examined about a letter he wrote exculpating Murdoch. Over the course of nearly twenty pages, Murdoch argued to the state court of appeal that "while the attorney-client privilege is entitled to great deference, the privilege must nonetheless yield when it clashes with more compelling Sixth Amendment rights of a criminal defendant to confrontation and cross-examination." Opening Brief at 125, *People* v. *Murdoch*, No. NA020621 (Cal. Ct. App. May 22, 1997). He also

argued that, if the privilege couldn't be forced to yield, "the constitutionally mandated solution to the dilemma *is to exclude the witness' testimony*." *Id.* at 137 (emphasis in original). In other words, Murdoch argued that either he should have been allowed to cross-examine Dinardo about the letter, or Dinardo's testimony should have been excluded. These arguments were backed up by plenty of citations to federal cases like *Douglas* v. *Alabama*, 380 U.S. 415 (1965), *and Davis* v. *Alaska*, 415 U.S. 308 (1974). And they were slam-dunks under California cases like *Vela* v. *Superior Court*, 208 Cal. App. 3d 141 (Ct. App. 1989), and *People* v. *Mincey*, 2 Cal.4th 408 (1992), both of which held that the Sixth Amendment right to confrontation supersedes the attorney-client privilege.

Murdoch took his appeal to the same court of appeal that decided *Vela*, and his case was assigned to the very same division of that court. He opened his Confrontation Clause argument by citing *Vela*, and he even had two of the *Vela* justices on his panel. Yet they did not discuss Murdoch's Confrontation Clause claim or distinguish *Vela* and *Mincey*. They simply ignored the issue, devoting not a single word to it over the course of a detailed thirty-page opinion that decided every one of Murdoch's other claims. The court of appeal's discussions of Murdoch's claims under the Fourth and Fourteenth Amendments consume almost seven pages. *People* v. *Murdoch*, No. NA20621, slip op. at 6-10, 19-20 (Cal. Ct. App. Mar. 26, 1998). Its analysis of Murdoch's Ex Post Facto Clause

argument takes up almost four pages. *Id.* at 23-26. The Sixth Amendment isn't even mentioned.

The court of appeal's failure to discuss the Confrontation Clause is all the more conspicuous because its opinion addressed Murdoch's other arguments about Dinardo's testimony and the letter; almost a third of the opinion—nine pages —is devoted to these topics. *Id.* at 14-19. Four and a half of those are specifically devoted to Murdoch's complaint that the letter was improperly withheld. *Id.* at 14-19. But these pages are filled with discussions of California evidence law, the nature of the attorney-client privilege under California law and various state-law objections. None of the cases the court of appeal cites apply the correct Sixth Amendment standard or do the relevant analysis. The Federal Constitution isn't mentioned, the Confrontation Clause isn't mentioned and there's definitely no discussion of *Douglas*, *Davis*, *Vela* or *Mincey*.

If you wonder how this could have happened, just read the state's response brief in the court of appeal. Like the court of appeal's opinion, it cites neither *Vela* nor *Mincey*. The state nowhere engages Murdoch's Sixth Amendment claim or so much as mentions his Confrontation Clause arguments about the letter. Response Brief at 33-36, *Murdoch*, Nos. B100877+.

None of this could possibly be Murdoch's fault; he couldn't have done more to put the court of appeal

on notice of his claim. Just look at the table of contents in his opening brief:

> XI. EVEN IF DINARDO'S LETTER WERE PRIVILEGED, APPELLANT'S 5TH AND 6TH AMENDMENT RIGHTS TO A FAIR TRIAL AND TO CONFRONT AND CROSS-EXAMINE THE CHIEF WITNESS AGAINST HIM WOULD TAKE PRECEDENCE OVER DINARDO'S ATTORNEY-CLIENT PRIVILEGE UNDER THE PARTICULAR FACTS OF THIS CASE

Id. at v. Murdoch's reply brief even tried to "respectfully redirect[ ] the Court's attention" to the sections of his opening brief that set out his Confrontation Clause arguments, ones
that the state's brief had overlooked. Reply Brief at 54-56 & n.17, *id.* Yet the court of appeal still decided his case without any discussion or acknowledgment of the Confrontation Clause.

We know they must have overlooked it, because California appellate courts can't intentionally skip over any claims: The California Constitution prohibits it. *See* 5 Cal. Jur. 3d *Appellate Review* § 706; *see also* Cal. Const. art. VI, § 14. To be sure, something as concise as "Defendant's remaining contentions do not merit discussion" will suffice. *See Lewis* v. *Superior Court*, 19 Cal.4th 1232, 1261-64 (1999); *People* v. *Rojas*, 118

Cal. App. 3d 278, 288-90 (Ct. App. 1981). But *something* must be said to indicate that the court is aware of the remaining issues and has resolved, rather than overlooked, them. The court of appeal in this case didn't include even a catch-all line and thus, according to state law, must be presumed to have overlooked the unaddressed issues.

It's not as though judges are immune from making this kind of mistake. *E.g.*, *United States* v. *California*, 558 F.2d 1347, 1353 (9th Cir. 1977) (noting on rehearing that "we overlooked" an argument made "in [the] briefs on appeal"), *rev'd*, 438 U.S. 645 (1978); *George Pepperdine Found.* v. *Pepperdine*, 126 Cal. App. 2d 154, 163-64 (Ct. App. 1954) (noting on rehearing that, "[b]y inadvertence," the court had "neglected" to distinguish between two separate demurrers); *see also* Fed. R. App. P. 40(a)(2); 5 Cal. Jur. 3d *Appellate Review* § 723 (2009). Truth be told, it happens to all of us once in a while.

An oversight usually doesn't make a difference because issues insignificant enough to escape notice are often meritless. *See, e.g.*, *California*, 558 F.2d at 1353; *Pepperdine*, 126 Cal. App. 2d at 164. But Murdoch had a winning argument based on binding California case law interpreting the federal Confrontation Clause—an argument the state effectively conceded by not responding to it. So, had the court of appeal actually thought about that claim, as it was required to, it would have had to

grant relief or disregard one of its own cases (*Vela*) while figuring out some way to distinguish on-point precedent from the California Supreme Court (*Mincey*). Courts just don't do that kind of work in white ink.

Not California Courts of Appeal at any rate. The requirement that they show they "necessarily and carefully analyzed the contentions" in play is no mere formality. *Rojas*, 118 Cal. App. 3d at 290. They can be reversed for disregarding it. *See Amwest Sur. Ins. Co.* v. *Wilson*, 11 Cal.4th 1243, 1266-68 (1995). The California Supreme Court has called this requirement an "[i]mportant incident[ ] of the right to appeal," one that's "been in existence as to [the California Supreme Court] since the adoption of the state Constitution of 1879 and as to the Courts of Appeal since their creation in 1904." *People* v. *Medina*, 6 Cal.3d 484, 489, 490 n.5 (1972) (internal citations omitted). For us to presume that an unmentioned claim was rejected on the merits does not respect state law. It disdains it.

When a California court fails to mention a claim, at least in catch-all fashion, we can be sure that it didn't decide the claim. And there is absolutely no authority for the proposition that a totally unmentioned, and therefore undecided, claim can be deemed to have been "adjudicated on the merits" when state law would treat the claim as overlooked. *See, e.g.*, 16A *Federal Procedure* § 41:179 (L. ed., West 2010) ("In making the determination of whether an issue was 'adjudicated on the merits' in

state court, the habeas court inquires into: (1) what state courts have done in similar cases . . . ."). The Supreme Court has held that when a state court declines to reach an issue because it erroneously concludes it need not, our review is *de novo*. *E.g.*, *Rompilla* v. *Beard*, 545 U.S. 374, 390 (2005); *Wiggins* v. *Smith*, 539 U.S. 510, 534 (2003). It makes no sense to treat an oversight born of negligence better than a mistake born of careful, if ultimately incorrect, reasoning.

b. This case exemplifies the problem with deferring to the sounds of silence. Had the court of appeal thought about Murdoch's claim, it would have realized that binding case law resolved the key issue in Murdoch's favor. Six years before Murdoch filed his appeal, the California Supreme Court held that a trial court erred in upholding an assertion of attorney-client privilege that conflicted with the Sixth Amendment. *Mincey*, 2 Cal.4th at 463-64. The facts of *Mincey* will sound familiar: A witness, implicated in the crime for which Mincey was convicted, testified pursuant to a cooperation agreement. The witness had communications with her attorney that, the defense believed, would cast doubt on her credibility at trial. The defense tried to question her about those statements, but she successfully asserted the attorney-client privilege. In those precise circumstances—where cross-examination as to attorney-client communications would have shed light on a witness's bias—the highest court in California held that the trial court

erred in sustaining the privilege. It did so based on the Confrontation Clause. *Id.* at 463-64.

Mincey is one in a string of California cases to hold that the attorney-client privilege, a creature of the law of evidence, must yield to a defendant's right to effective cross-examination, a command of the Constitution. The next most striking example is *Vela*. There the trial court sustained an attorney-client privilege claim by "the very police officers whose trial testimony will be necessary to prove the criminal charges filed against the defendants." 208 Cal. App. 3d at 150. The court of appeal—including two members of Murdoch's panel—unanimously reversed, based on the Confrontation Clause. *Id.* at 151.

So, the times when the California courts have actually adjudicated claims like Murdoch's, i.e., when there's evidence they thought about the issue as in *Vela* and *Mincey*, they've decided that the Sixth Amendment requires exactly what Murdoch claims it requires. To reach the opposite conclusion as the state judges did in *Vela*, *Mincey*, etc., all in the name of deference to those judges in *Murdoch*, does not show deference. Nor does it further "comity, finality, and federalism." *Williams* v. *Taylor*, 529 U.S. 420, 436 (2000). It subverts them.

c. When a state court doesn't decide a federal claim but we defer nevertheless, a petitioner is stripped of his right to have some court, any court, determine whether he's "in custody in violation of

the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). This upsets the "delicate balance" struck by AEDPA between vindicating the rights of criminal defendants and upholding the authority of state courts as the primary forum for adjudicating these rights. *Williams*, 529 U.S. at 436.

AEDPA vests the state courts with primary responsibility for determining whether a prisoner's confinement violates the Constitution. *See id.* When states accept this responsibility—as evidenced by their adjudication of a petitioner's constitutional claims on the merits—AEDPA requires us to accord great deference. 28 U.S.C. § 2254(d). When states don't, AEDPA deference doesn't apply and we must review the claim *de novo*. *E.g.*, *Rompilla*, 545 U.S. at 390; *Wiggins*, 539 U.S. at 534.

This scheme preserves the essence of habeas review announced in *Moore* v. *Dempsey*, 261 U.S. 86, 91-92 (1923) (Holmes, J.), because it ensures that *some* court is open to review the constitutionality of a petitioner's custody. But if a federal court defers to a state that failed to decide a claim, *no* court a prisoner may turn to will *ever* determine if his custody actually violates the Constitution. By hypothesis the state courts didn't, and our review will be limited to determining whether there was an "unreasonable" constitutional error. *See Delgado* v. *Lewis*, 223 F.3d 976, 981-82 (9th Cir. 2000). That's probably why our colleagues in other circuits have refused to defer in these circumstances, *Lyell* v.

Renico, 470 F.3d 1177, 1182 (6th Cir. 2006) (Sutton, J.); *Canaan v. McBride*, 395 F.3d 376, 382 (7th Cir. 2005) (D. Wood, J.); *Norde* v. *Keane*, 294 F.3d 401, 410 (2d Cir. 2002) (Miner, J.); *Gruning* v. *DiPaolo*, 311 F.3d 69, 71 & n.5 (1st Cir. 2002) (Torruella, J.); *Neill* v. *Gibson*, 278 F.3d 1044, 1053 (10th Cir. 2001) (Tacha, C.J.), and even less egregious ones, *Shelton* v. *Purkett*, 563 F.3d 404, 408-09 (8th Cir. 2009) (Beam, J.); *Henderson* v. *Cockrell*, 333 F.3d 592, 600-01 (5th Cir. 2003) (Jolly, J.); *Fortini* v. *Murphy*, 257 F.3d 39, 47 (1st Cir. 2001) (Boudin, C.J.); *Hameen* v. *Delaware*, 212 F.3d 226, 248 (3d Cir. 2000) (Greenberg, J.); *see also Bell* v. *Cone*, 543 U.S. 447, 460-61 (2005) (per curiam) (Ginsburg, J., concurring); *Chadwick* v. *Janecka*, 312 F.3d 597, 605-06 (3d Cir. 2002) (Alito, J.).

2. **Merits.** I would therefore decide Murdoch's Sixth Amendment claim *de novo*. Murdoch had no opportunity to cross-examine effectively the key prosecution witness about the primary issue regarding his credibility: whether he wrote a letter admitting that his testimony against Murdoch was coerced and untrue. This was not some remote inconsistency regarding a minor detail irrelevant to guilt or innocence; this went to the heart of the prosecution's case. Murdoch's Sixth Amendment rights were clearly violated. But I would rule for Murdoch even on the plurality's own terms, because it would have been an objectively "unreasonable application of . . . clearly established federal law . . . as determined by the Supreme Court" for the

California courts to conclude otherwise. 28 U.S.C. § 2254(d)(1).

a. The plurality concludes that the supremacy of the Sixth Amendment over California's attorney-client privilege isn't "clearly established." Pl. op. at 9042. "There are few subjects," however, "upon which [the Supreme] Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer* v. *Texas*, 380 U.S. 400, 405 (1965).

In *Crawford* v. *Washington*, 541 U.S. 36 (2004), the Supreme Court held up the trial of Sir Walter Raleigh as an example of what the Sixth Amendment was supposed to prevent. Read Raleigh's fate and consider what's "clearly established" about the Sixth Amendment:

> The most notorious instances of civil-law examination occurred in the great political trials of the 16th and 17th centuries. One such was the 1603 trial of Sir Walter Raleigh for treason. Lord Cobham, Raleigh's alleged accomplice, had implicated him . . . . Raleigh argued that Cobham had lied to save himself: "Cobham is absolutely in the King's mercy; to excuse me cannot avail him; by accusing me he may

> hope for favour." . . . [D]espite Raleigh's protestations that he was being tried "by the Spanish Inquisition," the jury convicted, and Raleigh was sentenced to death.
>
> One of Raleigh's trial judges later lamented that " 'the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh.' "

Crawford, 541 U.S. at 44 (citations omitted). This history is not part of the rule announced in *Crawford*. It long predates it. *See, e.g., California* v. *Green*, 399 U.S. 149, 157 n.10 (1970).

So, if the Sixth Amendment has been clearly established to mean anything, it's that the Cobhams and Dinardos of the world—defendants who implicate others as accomplices to curry favor with the sovereign—must either be subject to rigorous cross-examination or stand mute before the jury. There is a "basic understanding that when one person accuses another of a crime under circumstances in which the declarant stands to gain by inculpating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination." *Lee* v. *Illinois*, 476 U.S. 530, 541 (1986). There is also a "basic understanding" that forcing a witness to confront and explain his prior statements that contradict his testimony is the gold standard for effective cross-

examination. *See Harris* v. *New York*, 401 U.S. 222, 223-26 (1971). Nothing can deny a criminal defendant the right to have the government's key witness subject to this examination, certainly not "the vagaries of the rules of evidence." *Crawford*, 541 U.S. at 61. Not even a coordinate constitutional provision. *Harris*, 401 U.S. at 225-26.

b. The plurality stumbles into error because it never takes AEDPA's first step—identifying the fundamental legal principles announced in the Supreme Court's cases. Instead, the plurality treats the Supreme Court's Sixth Amendment jurisprudence like a series of unconnected contests between the right to confrontation and a particular rule of evidence: the Confrontation Clause v. the marital privilege; the Confrontation Clause v. the Fifth Amendment; the Confrontation Clause v. hearsay; etc. This way of looking at the Supreme Court's cases is myopic and wrong.

The Supreme Court uses cases with discrete facts to announce general principles. AEDPA instructs state courts to reasonably apply those principles, *see Williams* v. *Taylor*, 529 U.S. 362, 412 (2000), which the Court defines as the "*fundamental principles* established by [its] most relevant precedents." *Abdul-Kabir* v. *Quarterman*, 550 U.S. 233, 258 (2007) (emphasis added). "AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied." *Panetti* v. *Quarterman*, 551 U.S. 930, 953 (2007) (internal citations and quotation

marks omitted); *see also Lockyer* v. *Andrade*, 538 U.S. 63, 76 (2003). The plurality's insistence that habeas petitioners produce a " 'spotted calf' on the precise issue at hand" has no foundation in law. *Bradley* v. *Duncan*, 315 F.3d 1091, 1101 (9th Cir. 2002).

When there's no case on point, AEDPA permits relief if "a state court either unreasonably extends a legal principle from [the Supreme Court's] precedent to a new context where it should not apply *or unreasonably refuses to extend that principle to a new context where it should apply*." *Williams*, 529 U.S. at 407 (emphasis added). All of the Court's Confrontation Clause jurisprudence points to one fundamental principle: Criminal defendants must be afforded the opportunity to effectively cross-examine the witnesses against them. *E.g.*, *Davis*, 415 U.S. at 316; *Pointer*, 380 U.S. at 405; *Douglas*, 380 U.S. at 418-20. That, and nothing else, is what needs to be "clearly established." *See Abdul-Kabir*, 550 U.S. at 258.

We can divine this "fundamental principle" solely from cases where a hearsay exception or court procedure prevented effective cross-examination, *e.g.*, *Lilly* v. *Virginia*, 527 U.S. 116 (1999); *Coy* v. *Iowa*, 487 U.S. 1012 (1988). *Williams* instructs us to reason analogically, and it would be unreasonable to refuse to extend the principle established in those cases to Murdoch's case. The right to cross-examination is "functional," and the harm to "reliability in . . . truth-finding," *Kentucky* v. *Stincer*,

482 U.S. 730, 737 (1987), caused by denying a defendant access to a prior inconsistent statement by the chief witness against him is far greater than the harm of allowing a witness to testify behind a screen. *Compare Coy*, 487 U.S. at 1020, *with Lee*, 476 U.S. at 541. *See also United States* v. *Mayans*, 17 F.3d 1174, 1184 (9th Cir. 1994); *Burr* v. *Sullivan*, 618 F.2d 583, 587 (9th Cir. 1980).

But we need not look afield. The Supreme Court has a specific category of Confrontation Clause cases that address "restrictions imposed by law or by the trial court on the scope of cross-examination." *Stincer*, 482 U.S. at 737 (internal quotation marks omitted). For example, the Court found a Confrontation Clause violation where "defense counsel was restricted by state confidentiality provisions from questioning a witness about his juvenile criminal record, although such evidence might have affected the witness' credibility." *Id.* at 738 (citing *Davis*, 415 U.S. at 318). Even where the law that restricts cross-examination is a coordinate constitutional provision like the Fifth Amendment, admitting the witnesses' testimony while upholding the privilege violates the Confrontation Clause. *Douglas*, 380 U.S. at 420. The plurality cites no cases —because none exist—where the Supreme Court upheld the admission of testimony after a witness invoked a privilege that prevented "impeach[ment] by use of his earlier conflicting statements." *Harris*, 401 U.S. at 226. No such cases exist because "it is axiomatic that the defendant may employ the witness's prior inconsistent statements in order to

impeach" the witness's testimony. *United States* v. *Adamson*, 291 F.3d 606, 612 (9th Cir. 2002).

The plurality's discussion of whether the attorney-client privilege is "worthy of greater protection" than a state's marital privilege, pl. op. at 9042, is utterly beside the point. Surely neither is of higher dignity than the Fifth Amendment privilege—the granddaddy of all evidentiary privileges—which nevertheless proved insufficient to overcome the Confrontation Clause in *Douglas*. 380 U.S. at 420. Even if the attorney-client privilege were of the same dignity as the Fifth Amendment, the need for "cross-examination and impeachment" would overcome it. *Harris*, 401 U.S. at 223-26. As in *Harris*, it's not an all-or-nothing proposition: Murdoch could have been allowed to cross-examine Dinardo based on the letter, but Dinardo could have been allowed to retain a species of use immunity, in that the letter could not then be used by the state against him in a criminal case. *See, e.g.*, *Bittaker* v. *Woodford*, 331 F.3d 715, 721-25 (9th Cir. 2003) (en banc); *see also People* v. *Hunter*, 2005 WL 1377738, at *10 (Cal. Ct. App. June 10, 2005) (Kline, J., concurring).

At any rate, this issue is much simpler than the plurality makes it out to be. Either an evidentiary privilege operates to deny an opportunity for effective cross-examination or it doesn't; if it does, the Sixth Amendment prohibits both giving effect to the privilege and admitting the witness's statements. The privilege may yield or the

witness may be excluded, but one or the other has to give. The bottom line is clearly established by a long line of Supreme Court cases: A witness may not testify against a defendant in a criminal trial if that witness cannot be cross-examined effectively.

Swidler & Berlin v. *United States*, 524 U.S. 399, 408 n.3 (1998), is nowhere to the contrary. The plurality relies on *Swidler*'s supposed "reservation" of a question about the attorney-client privilege as proof that the superiority of the Bill of Rights over California evidence law remains an open question. Obviously *Swidler* didn't make any such reservation. First, *Swidler* was a case about whether the attorney-client privilege survived the death of a client; it did not deal with a conflict between that privilege and anyone's constitutional rights. *Id.* at 401. Second, even the petitioner in *Swidler* conceded that the privilege could be breached when a criminal defendant's constitutional rights are implicated. *Id.* at 408 n.3. Third, the Supreme Court did not "reserve" a Sixth Amendment question for another day; the Court's opinion contains not a single word about the Confrontation Clause. The Court simply noted that it did not "need to reach" the far broader question of when the attorney-client privilege must yield in the face of a criminal defendant's constitutional rights at trial. *Id.*

But again, all this is beside the point. It doesn't matter if the attorney-client privilege turns out to be the Rock of Gibralter. If it is, the Supreme Court's cases teach that the testimony of the un-

cross-examined witness can't come in. We know this from *Douglas*, which dealt with just such an inviolable privilege—the Fifth Amendment. 380 U.S. at 420. Nothing in *Swidler* calls this remedy into question, because *Swidler* dealt only with whether the privilege can be *breached*. The prosecutors there weren't trying to admit the privileged communications at trial; they were trying to learn of their contents in furtherance of an investigation.

c. These "fundamental principles" of the right to confrontation have not escaped other federal courts of appeals. The Second Circuit has held that "where assertion of the [attorney-client] privilege unduly restricts a defendant's cross-examination, the witness' direct testimony may have to be stricken." *United States* v. *Coven*, 662 F.2d 162, 170-71 (2d Cir. 1981). The Seventh Circuit has affirmed that "the right of confrontation conferred by the Sixth Amendment" can trump "[e]ven privileges recognized when the Constitution was written," *viz.*, the attorney-client privilege. *United States* v. *Rainone*, 32 F.3d 1203, 1206 (7th Cir. 1994). And the Eleventh Circuit thinks the same, having held in *Jenkins* v. *Wainwright* that "limitations on questioning" based on the attorney-client privilege are permissible only to the extent that the court "permit[s] cross-examination sufficiently thorough to satisfy the sixth amendment." 763 F.2d 1390, 1392 (11th Cir. 1985); *see also Mills* v. *Singletary*, 161 F.3d 1273, 1288 (11th Cir. 1998). Until the plurality wreaked havoc with our law, we were a comfortable member of this group. *Murdoch* v. *Castro*, 365 F.3d 699, 702 (9th

Cir. 2004). Many state courts have also recognized that the attorney-client privilege may not prevent effective cross-examination. Most significant of these for our case is California, *see* pp. 9052-53 *supra*, but it is hardly alone, *see State* v. *Cascone*, 487 A.2d 186, 190-91 (Conn. 1985); *Neku* v. *United States*, 620 A.2d 259, 262-63 (D.C. 1993). The plurality ignores these voices by relying on a single footnote in an irrelevant Supreme Court case. If this is what the "clearly established law" test requires, then AEDPA did not limit habeas relief; it eliminated it.

d. The opportunity to cross-examine is particularly important when it can "expos[e] a witness' motivation in testifying." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 678-79 (1986) (internal quotation marks omitted). It's all the more important when that witness is an accomplice cooperating with the government. *Lee*, 476 U.S. at 541; *see also Mayans*, 17 F.3d at 1184; *Burr*, 618 F.2d at 587. And *Van Arsdall* holds—it "clearly establishes"—that "cutting off all questioning about an event that the State conceded had taken place and that a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony" violates a defendant's right to confront the witness. 475 U.S. at 679; *see also Adamson*, 291 F.3d at 612.

Here, the state's star witness wrote a letter that, according to the prosecutor at trial, said "in sum and substance . . . that Mr. Dinardo was coerced by the police into implicating defendant Murdoch in

this crime." [TR 249] "A reasonable jury might have received a significantly different impression of [Dinardo's] credibility" had they heard about it. *Van Arsdall*, 475 U.S. at 680. The trial judge denied Murdoch's jury the chance. That means Murdoch's Sixth Amendment right to confrontation was violated. *Id.*; *Davis*, 415 U.S. at 318. It would be unreasonable to conclude otherwise.

When there has been a Confrontation Clause error, we "cannot [consider] whether the witness' testimony would have been unchanged, or the jury's assessment unaltered, had there been confrontation: such an inquiry would obviously involve pure speculation." *Coy*, 487 U.S. at 1021-22. Harmlessness "must therefore be determined on the basis of the remaining evidence." *Id.* at 1022. Though the plurality purports not to reach this issue, there are rather large hints throughout the opinion that Murdoch's inability to cross-examine Dinardo was no big deal. Nothing could be farther from the truth.

Consider what the trial would have looked like sans Dinardo. Murdoch has always steadfastly maintained his innocence. No physical evidence has ever linked him to the crime. Four witnesses from the bar testified, but only three even vaguely recognized Murdoch. [TR 604] And they were highly equivocal. One patron said: "It's been 13 years. And I can't be positive." [TR 625] Another could only say that Murdoch looked "similar" to the gunman, because "it was so many years ago." [TR 550, 579] Though the plurality makes much of the bartender's

identification of Murdoch, pl. op. at 9029, she was shown Murdoch's picture in a photo array immediately after the robbery and didn't recognize him. [TR 161] More than a dozen years later, she points to the only defendant in the courtroom and is sure it's him. Weak tea. There was no way the prosecution could have gotten a conviction without a miracle called Dinardo.

But don't take my word for it; just see what the trial judge, who presided both over Murdoch's case and Dinardo's, has to say about it: "[U]nless the District Attorney has something more, I just wonder without [Dinardo's] assistance where they're going." Appendix at 9069. [SER 363] He notes that Murdoch's prosecutors "have a very difficult case without [Dinardo's] assistance." *Id.* [SER 363] That's why the judge wanted "to be able—that there would be some agreement that might be beneficial to Mr. Dinardo and the prosecution." *Id.* at 9068. [SER 362] Just in case this was too subtle to move Dinardo, the trial judge goes on to explain that he wants "to do something different," for Mr. Dinardo, rather than give him the "set sentence" the law required upon conviction for first degree murder. *Id.* at 9069. [SER 363] All of this was, as he acknowledged, "not the judge's province" and a matter "actually between attorneys." *Id.* [SER 363] But the trial judge also wanted Dinardo to know that "I have 90 days to change [your] sentence if anything changes in the way of your mind" about testifying against Murdoch. *Id.* [SER 363] Disgraceful.

Denying Murdoch the right to confront Dinardo cannot have been an error harmless beyond a reasonable doubt. If the state courts held otherwise—which they didn't—they unreasonably applied law clearly established by the Supreme Court.

e. The court of appeal did not decide Murdoch's constitutional claim, so it's unclear whether the harmless-error standard of *Brecht* v. *Abrahamson*, 507 U.S. 619, 631 (1993), applies in place of the *Chapman* standard. *See Fry* v. *Pliler*, 551 U.S. 112, 118-19 (2007). But it makes no difference. Just as it would be objectively unreasonable to conclude that the error in this case was harmless beyond a reasonable doubt, *see* pp. 9062-63 *supra*, it's obvious this error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 631.

The plurality suggests that Murdoch "succeeded in eliciting testimony that challenged Dinardo's credibility as a witness," so any error couldn't have affected the jury's verdict. Pl. op. at 5. Even if that kind of argument could be made here, *but see Coy*, 487 U.S. at 1022, there's a huge difference between routine impeachment for bias and *specific* evidence that a witness has admitted that his trial testimony is untrue and a product of coercion from the get-go. The Supreme Court has long recognized the extraordinary effect that a witness's own inconsistent statement can have on a

jury. In a case addressing confessions, the Court held that a defendant's own inconsistent statements are "probably the most probative and damaging evidence that can be admitted against him." *Arizona* v. *Fulminante*, 499 U.S. 279, 296 (1991) (internal quotation marks omitted). The same, of course, would have been true for Dinardo. The letter was nothing less than a confession that Dinardo had lied about the central matter of his testimony. No only that, but the letter would have explained *why* Dinardo was lying. It shows it wasn't just the trial judge's generous deal. The police had pressured him from the outset.

Plea bargains are cut every day and jurors know it. A letter like Dinardo's comes along once in a lifetime. As Judge Bright put it in his powerful dissent, "[t]he letter and its disavowal of Murdoch's involvement in the crime would have been the piece de résistance, leading inextricably to the conclusion that Dinardo was not only generally unreliable but also untrustworthy regarding the one element of his testimony that the jury (as its verdict demonstrates) must have believed." *Murdoch*, 489 F.3d at 1071. "The concluding question on cross-examination of Dinardo seems obvious: 'Were you lying then or are you lying now?' " *Id.* Forcing a witness to admit to the jury that he's a liar is the Holy Grail of cross-examination. What Murdoch got instead was a paper cup.

Surely there must be grave doubt whether the jury would have reached a different result if the

letter had been admitted. Murdoch is entitled to a new trial so that cross-examination—the "greatest legal engine ever invented for the discovery of truth," *Green*, 399 U.S. at 158 (internal quotation marks omitted)—can be allowed to do its work.

3. **Procedural Default.** Judge Silverman agrees that Murdoch was denied his right to confrontation, but refuses relief because Murdoch's trial counsel "never sought to strike Dinardo's testimony." Concurrence at 9045. Judge Silverman doesn't contest that Murdoch argued on appeal that Dinardo's testimony should have been stricken. His problem with the timing of Murdoch's request must therefore sound in procedural default rather than exhaustion. In other words, Judge Silverman seems to think that, because Murdoch didn't move to exclude Dinardo's testimony at trial, his objection came too late—perhaps for failure to obey a contemporaneous objection rule or the like. State and federal law of procedural default belie such a claim.

As far as *Vela* reveals, Murdoch requested at trial precisely the remedy provided for under California law. Striking a witness's direct testimony isn't the *only* way California could have observed the Sixth Amendment's essential command. *Vela* holds as a matter of state law that, if necessary to permit effective cross-examination, California's attorney-client privilege "must give way." 208 Cal. App. 3d at 150. That's exactly what Murdoch asked for at trial.

I also doubt whether the California courts would have held Murdoch to any default, if default there was. California law says that "[a] defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights." *People* v. *Vera*, 15 Cal.4th 269, 276-77 (1997); *see also People* v. *French*, 43 Cal.4th 36, 46-47 (2008). And even if the California courts would ordinarily have held that Murdoch's claim was procedurally defaulted, the trial judge's conduct in this case might have excused any default. *See People* v. *Hill*, 17 Cal.4th 800, 820-22 (1998). These uncertainties would make me think long and hard whether, if California would hold that Murdoch somehow procedurally defaulted his claim, that's an "independent and adequate" procedural bar to federal relief. *Cf. Townsend* v. *Knowles*, 562 F.3d 1200, 1207-08 (9th Cir. 2009). I would also have to consider whether Murdoch can excuse any default by showing cause and prejudice, particularly in light of the trial judge's conduct. *Cf. Cook* v. *Schriro*, 538 F.3d 1000, 1025-26 (9th Cir. 2008).

But I need not reach any of these difficult issues because procedural default is " 'an affirmative defense, and *the state has the burden* of showing that the default constitutes an adequate and independent ground' " for denying relief. *Scott* v. *Schriro*, 567 F.3d 573, 580 (9th Cir. 2009) (quoting *Insyxiengmay* v. *Morgan*, 403 F.3d 657, 665 (9th Cir. 2005)) (emphasis in original). California didn't argue to the district court, and it hasn't argued to us, that the state courts rejected Murdoch's Confrontation

Clause claim on a procedural ground (or even that they should have). Nor has the state argued, as Judge Silverman would hold, that Murdoch was required to request exclusion of the witness at trial and that his failure to do so bars him from obtaining federal relief. That's the end of the road for any theory that Murdoch should be denied relief because he didn't ask for a particular remedy from the state trial court. *Chaker* v. *Crogan*, 428 F.3d 1215, 1220-21 (9th Cir. 2005). Habeas courts do not scour the record in search of every conceivable defect in a petitioner's presentation of a claim to the state courts. *Vela* is but one example of why: What we might require to preserve a claim is not always what the state courts would require. *Compare* Concurrence at 9044-45 *with Vela*, 208 Cal. App. 3d at 151.

California is satisfied with the procedural posture of this case. We are in no position to disagree.

* * *

Today we become the only court in the country to hold that a state court may adjudicate a constitutional claim "on the merits" by overlooking it, and then have its carelessness rewarded with AEDPA's presumption that its adjudication was good enough for government work. We defer to a decision the state courts never made to reach a result that the state's highest court disagrees with. We fail to give effect to the plain meaning of the Confrontation

Clause—one of the best-established principles of Anglo-American law—on the ground that it isn't "clearly established." Any one of these errors would be remarkable, but their combination produces a truly spectacular miscarriage of justice.

The purpose of AEDPA is to allow state courts to operate in good faith. So, in the ordinary case, when a defendant has an unbiased judge and the state courts take his constitutional claims seriously, we must defer even if we disagree on the merits. But this isn't an ordinary case. The state trial judge coerced a key witness into testifying and the state appellate judges never addressed the key claim on appeal. Cases like this are the reason federal habeas exists. When a federal constitutional claim falls through the cracks of a state's criminal justice system, federal courts must be there to catch it. No one else can. Charles Murdoch certainly deserved better from the California courts. Ultimately, though, it is we who surely did let him fall.

LONG BEACH, CALIFORNIA; WEDNESDAY,
SEPTEMBER 20, 1995
P.M. SESSION
DEPARTMENT SOUTH K HON. CHARLES D.
SHELDON, JUDGE
(APPEARANCES AS HERETOFORE NOTED.)

(THE FOLLOWING PROCEEDINGS WERE HELD
IN OPEN COURT:)

THE COURT: MR. DINARDO IS BEFORE THE COURT. THE LAWYER IS HERE, TOO, MR. FULLER. MR. CARBAUGH IS HERE FOR THE PEOPLE.

WE HAVE CONTINUED THIS A NUMBER OF TIMES.

MR. FULLER: JUST ONE MOMENT, YOUR HONOR.

THE COURT: GO AHEAD.

(THE DEFENSE COUNSEL SPEAKS WITH HIS CLIENT SOTTO VOICE.)

MR. FULLER: WE ARE READY TO PROCEED.

THE COURT: THIS COURT WOULD LIKE TO BE ABLE - - THAT THERE WOULD BE SOME AGREEMENT THAT MIGHT BE BENEFICIAL TO MR. DINARDO AND THE PROSECUTION, BUT WHAT I'VE HEARD INFORMALLY IS APPARENTLY WE'RE GOING FORTH WITH THE SENTENCING.

IS THAT TRUE, MR. FULLER?

MR. FULLER: YES, YOUR HONOR, THAT IS.

THE COURT: OKAY.

MR. CARBAUGH: AND I CAN SAY THE PEOPLE ARE READY FOR SENTENCING. I CAN ALSO SAY THAT MR. FULLER AND I HAVE HAD MANY DISCUSSIONS THAT I KNOW HE'S COMMUNICATED TO MR. DINARDO, AND MR. DINARDO HAS CHOSE TO PROCEED THE WAY

PUTTING ME TO TRIAL. AND I BELIEVE IN LAW AND ORDER. AND THAT'S ABOUT IT.

THE COURT: WELL, AS I HAVE ALREADY INDICATED BY AN INDIRECT RESPONSE TO MR. FULLER, I WOULD LIKE TO DO SOMETHING DIFFERENT, MR. DINARDO. YOU'VE PROBABLY BEEN TOLD IT'S A SET SENTENCE. I HAVE TO GIVE IT. THE ONLY THING I CAN SAY IS I HAVE 90 DAYS TO CHANGE THE SENTENCE IF ANYTHING CHANGES IN THE WAY OF YOUR MIND OR THE DISTRICT ATTORNEY'S MIND INSOFAR AS TRYING TO RESOLVE THIS WITH LESS THAN THE SET SENTENCE.

FRANKLY, FROM THE STANDPOINT OF THE OTHER TRIAL, UNLESS THE DISTRICT ATTORNEY HAS SOMETHING MORE, I JUST WONDER WITHOUT YOUR ASSISTANCE WHERE THEY'RE GOING; BUT MAYBE SOMETIMES CASES DEVELOP AT THE LAST

MINUTE. BUT, TO MY KNOWLEDGE, I DON'T KNOW OF ANY OTHER EVIDENCE. THEY HAVE A VERY DIFFICULT CASE WITHOUT YOUR ASSISTANCE. BUT THAT'S ACTUALLY BETWEEN ATTORNEYS, AND IT'S NOT THE JUDGE'S PROVINCE.

I WAS HOPING THERE WOULD BE A RESOLUTION SO THAT I COULD SENTENCE YOU TO SOMETHING LESS, WHICH I WOULD PREFER TO DO FROM EVERYTHING ABOUT THIS CASE, ESPECIALLY THE LENGTH OF TIME AND ALL THE YEARS THAT YOU LIVED WHAT APPEARS TO BE A LAW-ABIDING LIFE BEFORE YOU GOT ARRESTED.

UNFORTUNATELY FOR YOU, TECHNOLOGY HAS ADVANCED TO THE POINT WHERE YOU GOT ARRESTED WAY LATE IN THE GAME.

THE COURT MUST IMPOSE 25 YEARS TO LIFE FOR THE CONVICTION OF THE JURY. THAT'S WHAT IMPOSE. I WILL STAY THE 12022 ALLEGATION. I THINK IT'S ON YEAR. THAT STAY

WILL BECOME PERMANENT WHEN YOU SERVE THE TERM THAT YOU ARE GOING TO HAVE TO SERVE UNLESS SOMETHING CHANGES IN THE NEXT 90 DAYS.

$200 RESTITUTION FINE. 13967 GOVERNMENT CODE.

WHEN YOU ARE RELEASED ON PAROLE, ANY VIOLATION OF TERMS AND CONDITIONS OF PAROLE OR ANY LAW, YOU COULD GO BACK TO PRISON FOR ADDITIONAL TIME DURING THE TIME YOU ARE ON PAROLE.

ADDITIONALLY, IF YOU WANT TO APPEAL THE CONVICTION, THE SENTENCE OR BOTH, DON'T HAVE THE MONEY TO DO SO, AN ATTORNEY WILL BE APPOINTED FOR YOU TO FILE THE APPEAL BETWEEN NOW AND 60 DAYS FROM NOW. AND APPLY FOR AN ATTORNEY, IF YOU WANT ONE, TO THE DISTRICT COURT OF APPEALS.

MR. FULLER: YOUR HONOR, SO THE RECORD IS COMPLETE, I AM AT THIS TIME

FILING A NOTICE OF APPEAL WITH THIS COURT.

THE COURT: THANK YOU.

WE NEED A LOT OF CREDITS. HAVE YOU FIGURED THEM?

MR. FULLER: NO, YOUR HONOR, BUT I CAN FIGURE THEM IN 30 SECONDS.

THE COURT: TELL THE CLERK WHEN YOU DO THEM, AND SEE IF MR. CARBAUGH AGREES; AND THOSE WILL BE THE CREDITS.

MR. CARBAUGH: THANK YOU, YOUR HONOR.

(PROCEEDINGS CONCLUDED.)

THOMAS, Circuit Judge, with whom MCKEOWN, Circuit Judge, joins, dissenting:

As Judge Tashima has pointed out, the California Court of Appeal referenced Murdoch's Confrontation Clause argument in its decision and discussed the attorney-client privilege in quoting *People v. Godlewski*, 21 Cal. Rptr.2d 796, 800 (Ct. App. 1993). Assuming, *arguendo*, that the last reasoned state court opinion decided the Confrontation Clause argument on the merits, and that our review is therefore not *de novo*, I would still conclude that Murdoch is entitled to federal habeas relief.

For the reasons articulated by Chief Judge Kozinski, the California Court of Appeal decision was an objectively unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States in a long series of cases, including *Crawford v. Washington*, 541 U.S. 36 (2004), *Davis v. Alaska*, 415 U.S. 308 (1974), and *Douglas v. Alabama*, 380 U.S. 415 (1965). Thus, I join parts 2(a)-(e) and part 3 of Chief Judge Kozinski's dissent.

[FILED MARCH 7, 2005]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION

CHARLES MURDOCH, Petitioner, v. ROY CASTRO, Warden, et al., Respondents.	Civil No. CV-99-06900-RSWL (Mc) THIRD REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE ON A PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

This Third Report and Recommendation is submitted to the Honorable Ronald S.W. Lew, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 (b) (1) (B) and General Order 194 of the United States District Court for the Central District of California. For the reasons discussed below, the magistrate judge recommends that the court deny the present petition on the merits with prejudice.

BACKGROUND

The petitioner is a state prisoner at the High Desert State Prison in Susanville, California.

On December 28, 1995, after a trial in the Los Angeles County Superior Court, a jury found the

petitioner guilty of one count of first degree murder and one count of attempted murder. [Motion to Dismiss, Exh. A.] The jury also found that the petitioner committed the murder while he was engaged in the commission of the crimes of robbery and burglary and that a principal in the murder was armed with a firearm. [Motion to Dismiss, Exh. A.] On February 22, 1996, the trial court sentenced the petitioner to the state prison for a term of life without the possibility of parole plus one year. [Motion to Dismiss, Exh. B.]

The petitioner appealed the trial court judgment to the California Court of Appeal. [Motion to Dismiss, Exh. C] The petitioner also concurrently filed a petition for writ of habeas corpus in the California Court of Appeal. [Motion to Dismiss, Exh. G.] On March 26, 1998, the California Court of Appeal denied the petition for writ of habeas corpus. [Motion to Dismiss, Exh. D, p. 218.] As to the appeal, the California Court of Appeal modified the trial court judgment to strike the conviction for attempted murder but affirmed the trial court judgment in all other respects. [Motion to Dismiss, Exh. D., p. 242.]

On May 1, 1998, the petitioner filed a petition for review in the California Supreme Court. [Motion to Dismiss, Exh. E.] On July 8, 1998, the California Supreme Court denied the petition for review. [Motion to Dismiss, Exh. F.]

On July 6, 1999, the petitioner filed his initial petition for writ of habeas corpus in this court. On September 20, 1999, the respondent filed a motion to

dismiss for failure to exhaust state remedies. On October 22, 1999, the petitioner filed a motion to amend the petition and a first amended petition containing seven claims. On November 2, 1999, the court granted the petitioner's motion to amend.

The first amended petition contained seven claims, among which were claims 4 and 5 which alleged:

Claim 4

The petitioner was deprived of his constitutional right to cross-examination when the trial court allowed an improper assertion by prosecution witness Dinardo of the attorney-client privilege.

Claim 5

The petitioner's Fifth and Sixth Amendment rights were violated when the trial court allowed prosecution witness Dinardo to testify after Dinardo made two statements, one incriminating the petitioner and the other exonerating the petitioner, and allowed Dinardo to invoke the attorney-client privilege so as to exclude the exculpatory statement.

One September 14, 2001, the magistrate judge caused to be filed a Report and Recommendation, recommending that the district judge deny the petition on the merits.

On November 18, 2001, the magistrate judge caused to be filed a Final Report and Recommendation, responding to objections filed by the petitioner and again recommending that the district judge deny the petition on the merits.

On March 8, 2002, the district judge caused to be entered a judgment denying the petition on the merits.

The petitioner appealed.

On April 5, 2004, the Ninth Circuit Court of Appeals in a published opinion vacated the judgment and remanded the action to the district court for further proceedings. Murdoch v. Castro, 365 F.3d 699 (9th Cir. 2004).

STATEMENT OF FACTS

The following facts are taken from the reported decision of the Ninth Circuit Court of Appeals:

Petitioner Charles Murdoch is currently serving a life sentence without possibility of parole in the California penal system for convictions of first degree murder and attempted murder. The convictions are based upon a murder which occurred in 1983 while four people were committing a robbery in the Horseshoe Bar in Long Beach California. One bystander was shot and killed; another was stabbed and wounded. After an initially fruitless investigation, the case was designated an unsolved crime. The investigation remained dormant until 1994, when the Long Beach Police Department had acquired the necessary technology to access a previously inaccessible central fingerprint database and ran the prints on file in this case. That led to the identification of Dino Dinardo as one of the robbers. The Horseshoe's bartender, Dyanne Spence, then tentatively identified Dinardo, and he was arrested in June 1994.

When first questioned by a police detective, Dinardo denied any involvement in the incident. Under pressure from the police, however, he then recanted, admitted to his involvement in the robbery, and identified Charles Murdoch, the petitioner, as one of his accomplices. The District Attorney eventually charged both Dinardo and Murdoch with murder accompanied by special circumstances, crimes carrying possible sentences of life imprisonment without parole.

Dinardo was tried by himself and convicted by a jury of first-degree murder and sentenced to twenty-five years to life. At Dinardo's sentencing, however, the sentencing judge suggested that his sentence might be subsequently reduced if he cooperated and testified against Murdoch. Dinardo took the hint and agreed to testify against Murdoch in return for a reduction of his conviction to voluntary manslaughter with a sentence of twelve years.

At Murdoch's trial, Dinardo testified that on the day of the robbery, Murdoch came by his house with an unidentified Mexican-American man Dinardo did not know and asked if Dinardo wanted to make some money by doing "a job," which he understood to mean committing a hold-up. Dinardo was to grab the money out of the till while the others, who would be armed with a gun and a knife, kept watch. Another unidentified Mexican-American man was driving the car they rode in to the bar. Murdoch entered the bar armed with a .22 caliber rifle and announced the robbery. Dinardo jumped across the bar and took two hundred dollars out of the register,

at which time he heard a shot. He left through the back door and they all divided the money. Dinardo testified that he did not know anyone was hurt until he was questioned by the investigators in 1994.

In addition to Dinardo, witnesses from the bar also testified, including bartender Spence. After Murdoch's arrest in 1994, Spence identified him in a line-up, but she and others had been unable positively to identify Murdoch in photo arrays eleven years earlier, on the heels of the robbery. The record strongly suggests that without Dinardo's accomplice testimony, the prosecution's case against Murdoch was weak.

Murdoch used Dinardo's reduced sentence and lesser conviction to impeach him, but here's the rub. Prior to opening statements, the prosecutor informed the trial court and defense counsel she had discovered the existence of a letter, apparently written by Dinardo to his attorney, in which Dinardo allegedly exonerated Murdoch and claimed that his own statements to the contrary had been coerced by the police. The prosecutor claimed never to have possessed or actually seen the letter. She knew of its existence only through an interview with Dinardo. The letter, it turned out, was in the possession of Dinardo's attorney, who asserted on Dinardo's behalf that it was protected by the attorney-client privilege. The trial court took possession of the letter without allowing Murdoch's counsel or the prosecutor to see it and ruled after reading it that Dinardo was entitled to the privilege. The court did so without mention of the constitutional guarantee now at

issue. After so ruling, the court returned the letter to Dinardo's attorney and ordered that he safekeep it in case of appeal.

One direct appeal, and in his petitions for state post conviction and federal habeas relief, Murdoch raised, *inter alia*, his claim that the trial court's failure to allow him to see or use the privileged letter violated his right to confrontation. The California Court of Appeal denied relief, and the California Supreme Court declined his petition for review. Petitioner's federal habeas petition was denied by the district court. This circuit granted a Certificate of Appealability limited to the issue of "whether appellant's federal constitutional rights were violated when the trial court ruled that prosecution witness Dinardo's letter was protected by attorney-client privilege." Murdoch v. Castro, 365 F.3d at 700-702.

DECISION OF THE NINTH CIRCUIT COURT OF APPEALS

The Ninth Circuit construed the petitioner's claim as one under the Confrontation Clause of the Sixth Amendment. The petitioner asserted that he had been deprived of the right to effective cross-examination of Dino Dinardo when the trial court sustained Dinardo's claim of attorney-client privilege and prevented disclosure of a letter which Dinardo wrote to his lawyer while in jail awaiting trial. The Ninth Circuit held that this factual situation presented:

"a situation where a substantial showing has been made that, depending upon the content of

Dinardo's letter, the Confrontation Clause and attorney-client privilege are potentially at odds -- a set of facts the Supreme Court has not yet examined. Its precedents, however, clearly provide that evidentiary privileges or other state laws must yield if necessary to ensure the level of cross-examination demanded by the Sixth Amendment."

Murdoch v. Castro, 365 F.3d at 702, citing Olden v. Kentucky, 488 U.S. 227, 232, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988), Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); Davis v. Alaska, 415 U.S. 308, 319, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); and Douglas v. Alabama, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965).

Essentially, the Ninth Circuit held that the attorney-client privilege might have to yield in a particular case if the right of confrontation would be violated by enforcing the privilege. Murdoch v. Castro, 365 F.3d at 703, citing United States v. Rainone, 32 F.3d 1203, 1206 (7th Cir. 1994). "The court must ultimately decide whether the probative value of the [excluded] alleged privileged communication was such that the defendant's right to effective cross examination was substantially diminished." Murdoch v. Castro, 365 F.3d at 703, quoting United States ex rel. Blackwell v. Franzen, 688 F.2d 496, 501 (7th Cir. 1982).

The Ninth Circuit decision concluded:

Without knowing the contents of the letter, or seeing any evidence that the contents were examined by the state courts during Mudoch's post-conviction relief proceedings, the federal courts are

not able to determine whether or not the California Court of Appeal's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254 (d). Similarly, without the letter, we are unable to determine in the first instance whether, in this case, the attorney-client privilege "must fall before the right of petitioner to seek out the truth in the process of defending himself." *Davis*, 415 U.S. at 320, 94 S.Ct. 1105. We will not "require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness," where neither the state nor federal courts actually reviewed the privileged material on habeas and made a decision as to its relevant probative value. *Id.*

We now vacate the district court's denial of Murdoch's § 2254 petition, and remand this case to the district court. We instruct the district court to use its process to obtain the letter. Once the letter is obtained, the district court shall then determine in camera and as the court deems appropriate whether, as applied to the totality of facts in this case, the denial of access to Dinardo's letter resulted in an unconstitutional denial of Murdoch's Sixth Amendment right to confront witnesses.

Murdoch v. Castro, 365 F.3d at 706.

THE LETTER

Pursuant to the directive of the Ninth Circuit Court of Appeals, the magistrate judge has reviewed the letter at issue in camera. The letter is a two-page handwritten letter signed by Dino Dinardo, dated December 1, 1994, attached to a copy of what appears to be the face of an envelope in which the letter was originally enclosed. The envelope is addressed to "Kenneth Starr [sic] & Nelda Barrett." The handwriting addressed to "Kenneth Starr" on the face of the envelope appears to be different from the handwriting used to write "Nelda Barrett." "Kenneth Starr" is written in cursive script. "Nelda Barrett" is written in block printed letters. Attorney Ken Star is or was a Deputy Public Defender who represented Dino Dinardo at the preliminary hearing in this action on December 8 and 12, 1994. [CT, p. 1.] Attorney Nelda Barrett is or was a Deputy Alternate Public Defender who represented petitioner Murdoch at the same preliminary hearing. [CT, p. 1.]

The letter is subject to a claim of privilege, a claim which has been sustained by the state courts.[1] If this court were explicitly to disclose the contents of

---

[1] The Ninth Circuit opinion points out that a federal habeas court cannot review the propriety of a claim of privilege based upon the state law of evidence. Murdoch v. Castro, 365 F.3d at 703, n. 1. Thus, this court cannot properly explore whether Dinardo waived his claim of privilege by addressing or possibly distributing the letter to Murdoch's counsel, Nelda Barrett. The California Court of Appeal discussed this issue and concluded that there was no waiver. [Respondent's Motion to Dismiss, filed January 15, 2000, Exh. D., p. 232-3.]

the letter, the privilege would irrevocably be breached. To preserve the privilege as best is possible, the magistrate judge will not now disclose the exact text of the letter. However, at a later point in this Third Report and Recommendation, to accomplish the task the Ninth Circuit assigned to this court, the magistrate judge discusses and analyzes the assertions in the letter to determine the "probative effect" of the letter. It should suffice at this point to say that the letter contains factual assertions regarding petitioner Murdoch's participation in the robbery-murder which are inconsistent with and which contradict Dinardo's trial testimony and Dinardo's statement to the police upon his arrest on June 30, 1994.

PROCEEDINGS IN THE STATE TRIAL COURT

The proceedings in the trial court regarding disclosure of the December 1, 1994 letter were as follows. Before opening statements in the trial, the prosecutor informed the court and petitioner's counsel that, during an interview with Dinardo, she had been told of the existence of a letter from Dinardo. The prosecutor stated that she had not actually read the letter. However, she believed that the letter said that "Dindardo was coerced by the police into implicating Defendant Murdoch in this crime." [RT 249.]

The petitioner's trial counsel was aware of the existence of the letter, but not of its contents. Before Dinardo testified, the petitioner's counsel stated his belief that Dinardo's lawyer, Jack Fuller, had the letter. The petitioner's counsel requested the court

to order Fuller to produce it. Mr. Fuller asserted a claim of work product. The trial judge ordered Fuller to deliver the letter to the court for its review. [RT 728.] Fuller then produced the letter, noting that it was delivered to Dinardo's previous lawyer, Mr. Star. [RT 751.] Fuller also noted that the envelope accompanying the letter was also addressed to Ms. Nelda Barrett, the petitioner's previous lawyer. Fuller asserted a claim of attorney-client privilege and the work product doctrine with respect to the letter. [RT 751]. After reviewing the contents of the letter, the trial judge held that the attorney-client privilege applied to the letter. [RT 768.] The trial judge further stated: "I see no exception to the attorney-client privilege, in my opinion, it's inviolate insofar as these facts are concerned . . . ." [RT 769.] The trial judge ordered Mr. Fuller to retain the letter in his possession in case it was needed in any further proceeding. [RT 769.]

PROCEEDINGS IN THE CALIFORNIA COURT OF APPEAL

In some manner that is not clear on the record before this court, the December 1, 1994 letter was submitted under seal to the California Court of Appeal while that court considered the petitioner's appeal and state habeas petition. Pursuant to this court's order, the sealed manila envelope from the California Court of Appeal and the letter contained therein have now been deposited with this court. The outside of the sealed envelope contains what appears to be the signatures of various justices of the

California Court of Appeal stating that the manila envelope was opened, read and resealed.

Attorney Barbara Perry represented petitioner Murdoch in his direct appeal. The opinion of the California Court of Appeal states, in pertinent part:

"The letter remains under seal by order of this court. On December 3, 1996, we granted Murdoch's appellate counsel access to the letter . . . . On August 1, 1997, we granted the People's request to view the outside of the envelope (but not the letter itself)".

[Respondent's Motion to Dismiss, filed January 14, 2000, Exh. D, p. 231, n.5.] The outside of the manila envelope submitted to this court contains the signature of Ms. Perry stating that she "Reviewed per ct order & resealed".

The opinion of the state of Court of Appeal contains a discussion of the applicability of the attorney-client privilege under California state law. After some discussion, the state Court of Appeal held that the letter was a statement made during the course of an attorney-client relationship, was intended to be confidential and that Dinardo had not waived the privilege. [Id., Exh. D, pp. 230-234.]

The California Court of Appeal then stated:

Finally, Murdoch claims that even if the letter fell within the attorney-client privilege, and if the privilege was not subsequently raised, his need to discover the contents of the letter outweighed Dinardo's interest in confidentiality because the letter was "directly exculpatory. It expressly

contradicted the version of events which Dinardo told at trial -- and at the time of his arrest -- with respect to apellant's culpability." In his habeas petition, Murdoch asserts the letter did even more because it "substantively exculpates petitioner." We are not persuaded. "[I]t is patent that the attorney-client privilege is not one to be easily discarded merely because a defendant asserts that invocation of the privilege results in the denial of his right to a fair trial." (*People v. Godlewski* (1993) 17 Cal.App.4th 940, 947.) "[W]e conclude that only the most extraordinary circumstance would justify disclosure of privileged communications between lawyer and client . . . ." (*Id.*, at p. 945.) We do not find such an extraordinary circumstance here. [Id., Exh. D, pp. 234-35.] This is the entire discussion by the California Court of Appeal of the petitioner's claim of a right of access to the contents of the December 1, 1994 letter.

DISCUSSION

The Ninth Circuit Court of Appeals ordered this court:

(1) to obtain the December 1, 1994 letter and to discover its contents in camera;

(2) to determine whether the contents of the letter were examined by the state courts during the petitioner's post-conviction proceedings;

(3) to determine whether the decision of the California Court of Appeal was contrary to, or involved an unreasonable application of, clearly established federal law as established by the

Supreme Court of the United States or resulted in a decision that was based on an unreasonable determination of facts in the light of the evidence presented in the State court proceeding; and

(4) to determine whether the denial of access to Dinardo's letter resulted in an unconstitutional denial of petitioner Murdoch's Sixth Amendment right to confront witnesses.

Contents of the Letter

Long Beach police officers arrested Dino Dinardo in Berkeley, California on June 30, 1994. [RT 907.] After his arrest, Dinardo made a statement inculpating petitioner Murdoch. [RT 921, 924-5.] Dinardo wrote the letter at issue in the present petition on December 1, 1994, a week or so before the joint preliminary hearing for Dinardo and Murdoch, which was heard on December 8 and 12, 1994. Murdoch's trial was in December of 1995. Dinardo testified at Murdoch's trial that Murdoch planned the robbery, that Murdoch recruited Dinardo as a participant in the robbery, that Dinardo and Murdoch committed the robbery, and that Murdoch shot and killed one of the bar patrons during the course of the robbery.

This court has read Dinardo's December 1, 1994 letter. The letter flatly contradicts Dinardo's June 30, 1994 statement and Dinardo's trial testimony regarding Murdoch's participation in the robbery-murder. The letter states that Dinardo never committed any crime with Murdoch. If the contents of the letter had been disclosed at trial to Murdoch's trial counsel, it is clear that trial counsel would have

impeached Dinardo with Dinardo's prior consistent statement in the letter. Absent the claim of privilege, it is clear that the trial court would have admitted the letter as a prior inconsistent statement.

It thus appears that the factual situation in this case is exactly as the opinion of the Ninth Circuit Court of Appeals speculated that it might be: "[t]he privileged letter is the only evidence of prior (purportedly) inconsistent statements by Dinardo regarding Murdoch's involvement in the robbery and murder." Murdoch v. Castro, 365 F.3d at 705.

State Court Review of the Letter

At trial, the trial judge apparently read the December 1, 1994 letter in camera. There is nothing in the record reflecting any attempt by the trial court to balance the petitioner's right to confront and cross-examine Dinardo using the contents of the letter, against Dinardo's attorney-client privilege. The trial court found that the letter was written within the attorney-client privilege and that there was no applicable exception to the privilege. The trial court explicitly found that the claimed privilege is "inviolate". [RT 769.] On this record, the state trial court made no attempt to balance petitioner Murdoch's right to confront witnesses using the contents of the letter against Dinardo's attorney-client privilege.

The California Court of Appeal also examined the contents of the December 1, 1994 letter during the petitioner's post-conviction proceedings. The state Court of Appeal did not explicitly attempt to weigh the petitioner's right of confrontation against

Dinardo's attorney-client privilege. The only relevant portion of the decision of the state Court of Appeal is quoted in full above. In making its determination, the decision of the state Court of Appeal quoted a couple of sentences from another state court decision, People v. Godlewski, 17 Cal.App.4th 940, 21 Cal.Rptr.2d 796 (1993). The California Court of Appeal in Murdoch's case used the Godlewski quotes to make the following conclusory determination: Disclosure of a privileged communication may only be justified by "the most extraordinary circumstance." No such extraordinary circumstance exists in this case. Therefore, the court will not order disclosure of the privileged communication. (See excerpt from California Court of Appeal decision, quoted at pp. 12-13 above.)

The Ninth Circuit Court of Appeals has ordered this court to determine whether the California Court of Appeal weighed Dinardo's claim of privilege "in the light of Murdoch's right to effective cross examination." Murdoch v. Castro, 365 F.3d at 705-6. It appears that the California Court of Appeal did not perform any process balancing Dinardo's claim of privilege against Murdoch's right of confrontation. Instead, the California Court of Appeal found that the privilege could only be disclosed by an order of the court in a "most extraordinary circumstance", a situation which it found did not exist in this case. By making a conclusory finding of the absence of a "most extraordinary circumstance", the state Court of Appeal avoided any balancing process.

This court thus answers the second and third questions put to it by the Ninth Circuit Court of Appeals as follows: The trial court and the California Court of Appeal both read the December 1, 1994 letter of Dinardo to his counsel. After reading the letter, the trial court declined to order disclosure of the letter because, in its view, the attorney-client privilege is "inviolate" or, in effect, absolute. The California Court of Appeal declined to order disclosure of the letter on the ground that there existed no "most extraordinary circumstance" justifying disclosure. This holding was not based on a process of weighing Murdoch's right to confront witnesses against Dinardo's attorney-client privilege.

In its opinion in Murdoch v. Castro, the Ninth Circuit held that the precedents of the United States Supreme Court "clearly provide that evidentiary privileges or other state laws just yield if necessary to ensure the level of cross-examination demanded by the Sixth Amendment. Id. at 702. By declining to consider whether, on the facts of this case, Murdoch's right of confrontation trumped Dinardo's right of non-disclosure of privileged communications, the decision of the California Court of Appeal "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254 (d) (1). That, however, does not end the inquiry. This court must determine whether Murdoch's right of confrontation was violated on the facts of this case.

Probative Value of Dinardo's Letter

To this point in time, the petitioner's claim regarding Dinardo's December 1, 1994 letter to his lawyer has been reviewed, in sequence, by the California Superior Court, the California Court of Appeals, the California Supreme Court, this court and the Ninth Circuit Court of Appeals. Until now, no court has attempted to determine whether the petitioner's right of confrontation was violated by failure to allow the petitioner to read an use the letter at trial. Because no court has yet made that determination, this court must now make it.

The Ninth Circuit decision in this matter stated that the ultimate issue for this court to determine is whether, on "the totality of facts in this case, the denial of access to Dinardo's letter resulted in an unconstitutional denial of Murdoch's Sixth Amendment right to confront witnesses." Murdoch v. Castro, 365 F.3d at 706. In making a decision regarding that ultimate issue, the Ninth Circuit stated that the court must make "a decision as to . . . [the] relevant probative value" of Dinardo's letter. Id. at 706. It thus appears that the Ninth Circuit adopted the test which it quoted in an earlier portion of its opinion. "'The court must ultimately decide whether the probative value of the [excluded] alleged privileged communication was such that the defendant's right to effective cross examination was substantially diminished." Id. at 703, quoting United States ex rel. Blackwell v. Franzen, 688 F.2d at 501. This court thus proceeds to determine the probative value of the Dinardo letter.

Making this determination inevitably involves disclosure of more of the contents of the letter. A determination of the probative value of the letter involves an analysis of the factual assertions in the letter and a comparison of those factual assertions with facts admitted in pre-trial or trial testimony.[2]

Dinardo's December 1, 1994 letter asserts the following facts:

(1) After Dinardo's arrest in Berkeley, Long Beach Police Detective Pavek coerced a statement from Dinardo by promising not to charge Dinardo in exchange for Dinardo's statement;

(2) In this statement, Dinardo was forced to identify petitioner Murdoch as a participant in the crime;

(3) Dinardo does not actually know Murdoch although Dinardo is aquainted with Murdoch's brother; and

(4) Murdoch and Dinardo did not commit any crime.

---

[2] The opinion of the Ninth Circuit ordered this court, on the one hand, to review the letter in camera and, on the other hand, to determine the relevant probative value of the letter. Murdoch v. Castro, 365 F.3d at 706. This court issues its opinions in public documents. The court cannot fully maintain the privileged nature of the letter, while publicly discussing the relevant probative value of the letter. The best that can be done to accomplish the somewhat conflicting mandate of the Ninth Circuit is to refrain from publishing the exact words of the letter, while summarizing and discussing the factual assertions stated therein.

Detective Ronald Pavek testified at the trial that he made no promises to Dinardo during the June 30, 1994 interview:

> There were no promises made to that man [Dinardo] ever.
>
> In fact, we were very emphatic in the oral interview. I am not empowered to do anything. This is a murder-robbery We're talking about here, and the best way to help himself was to tell me exactly what happened.
>
> There was never any inferences made, there was never any promises made that if you cooperate with us, everything will go easier.
>
> We don't do that. We can't do that. We are not allowed to do that. And I couldn't do anything for him anyhow. I'm just a policeman.

[RT 917, lines 5-15.] Detective Pavek testified that, during the June 30, 1994 interview, Dinardo kept referring to a person named "Charles or Chuckie". [RT 921.] Eventually, Pavek recalled that Pavek had a group of photo mug shots in his file from the earlier investigation in 1983. Pavek showed those photos to Dinardo, including a photo of petitioner Charles Murdoch. Dinardo grabbed the photo of Murdoch and said, "That's him, that's Charles." [RT 925.] Dinardo turned the photo over and saw Murdoch's name written on the back of the photo. Pavek testified that "He [Didonato] said Murdock [sic] Murdock that's it." [RT 926.]

Dinardo testified at the petitioner's trial that, during Detective Pavek's interview with Dinardo on

June 30, 1994, Dinardo hoped to get released. Gradually, as the interview went on, Dinardo knew he would not be released. [RT 860-2, 860-7, 860-9.]

John Murdoch, the brother of petitioner Charles Murdoch, testified at the trial. John Murdoch is two years older than his brother, Charles. [RT 664.] When John Murdoch was 13 years old, Dino Dinardo played in the same neighborhood as John and Charles Murdoch. [RT 665, 667.]

Witness Patrick Condon testified at petitioner Murdoch's trial. Condon was Murdoch's former roommate, sharing a house with Murdoch in the time between 1980 and 1983. [RT 712-13.] Condon knew Dino Dinardo to be a friend of Charles Murdoch. [RT 712.] When Condon and Charles Murdoch lived together, Dinardo would come over and visit Charles Murdoch. [RT 713.]

Investigating police officers collected fingerprints from the area of the bar cash register after the robbery-murder. [RT 162, 890-91.] Fingerprints taken from the scene of the crime were matched to Dino Dinardo in 1994. [RT 898-99.]

The four factual assertions in the December 1, 1994 letter were: (1) that the police coerced Dinardo; (2) to inculpate Murdoch; (3) with whom Dinardo was unacquainted; (4) in circumstances in which Murdoch and Dinardo did not commit any crime. Of these assertions, trial testimony rebutted the first three, and half of the fourth, leaving only the assertion that Murdoch did not commit the crime. In these circumstances, the excluded letter does not appear to have significant probative value. Most

strikingly, if the petitioner had been able to present the contents of Dinardo's letter to a jury, the petitioner would necessarily have had to contend that Dinardo's trial testimony was false while the contents of the letter were true. However, the petitioner's own brother and his former roommate testified that Dinardo and Charles Murdoch were friends. The statement in the letter that letter that Dinardo did not know Charles Murdoch was false, given the testimony of the petitioner's own brother and his roommate. Moreover, at least half of the statement in the letter that Murdoch and Dinardo had not committed any crime was demonstrably false. Dinardo's fingerprint was found on or near the bar cash register. Dinardo's denial of involvement in the crime was thus patently false. The clear falsehoods undermine the credibility of every other statement in the letter.

The essential value of the December 1, 1994 letter to petitioner Murdoch was as a prior inconsistent statement of Dinardo to impeach Dindardo's trial testimony that Murdoch committed the robbery-murder. The letter contains a pre-trial statement of Dinardo stating that Murdoch was not involved in the robbery-murder. Admission of that statement into evidence in isolation clearly would have benefitted Murdoch. However, other factual statements in the letter were either contradicted by trial testimony (the assertion that the police coerced the June 30, 1994 statement from Dinardo and coerced Dinardo to inculpate Murdoch) or were demonstratively false in the light of other testimony (the assertions that Dinardo was not acquainted

with Murdoch and that Dinardo had not committed any crime). The letter is the only evidence of a prior inconsistent statement of Dinardo regarding Murdoch's involvement in the robbery-murder. However, taken as a whole, the intrinsic probative value of the letter was and is low.

If Murdoch had been able to use the letter to impeach Dinardo at trial, the impeachment value of the letter would have been markedly attenuated because of the nature of the facts Dinardo asserted in the letter. The court concludes that, given the low intrinsic probative value of the December 1, 1994 letter, the petitioner's right to effective cross-examination at the trial was not substantially diminished by the trial court's exclusion of the letter from evidence. United States ex rel. Blackwell v. Franzen, 688 F.2d at 501.

Prejudice

Even if the court were to find that the December 1, 1994 letter had significant probative value and that exclusion of the letter constituted a violation of the Confrontation Clause, the court must still determine if the petitioner suffered prejudice as a result of the trial court's exclusion of the letter from evidence. A constitutionally improper denial of a criminal defendant's opportunity to impeach a witness, like other Confrontation Clause errors, is subject to harmless error analysis. Delaware v. Van Arsdall, 475 U.S. at 684. "[T]he denial of the opportunity to cross-examine an adverse witness does not fit within the limited category of

constitutional errors that are deemed prejudicial in every case." Id. at 682.

On habeas review of trial-type errors such as that alleged here, this court must apply the harmless error standard set forth in Brecht v. Abrahamson, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). See Shumway v. Payne, 223 F.3d 982, 986 (9th Cir. 2000); Bains v. Cambra, 204 F.3d 964, 976-77 (9th Cir.), cert. denied, 531 U.S. 1037, 121 S.Ct. 627, 148 L.Ed.2d 536 (2000). Brecht forbids a grant of habeas relief for a trial-type error unless the error had a "substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. at 637.

"When a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had a 'substantial and injurious effect or influence in determining the jury's verdict,' that error is not harmless. And, the petitioner must win." O'Neal v. McAninch, 513 U.S. 432, 436, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995).

Even if the failure to admit the letter at issue violated the Confrontation Clause, the error in failing to admit the letter was harmless. As the court has stated above, three and half out of the four assertions in Dinardo's letter were either controverted or proved to be demonstrably false at trial. Given these facts, the probative value of the letter was not substantial. In these circumstances, this court should not harbor a grave doubt whether, if the letter had been admitted into evidence and considered by the jury, the jury would have reached

a different verdict and acquitted petitioner Murdoch of the robbery-murder.

The court acknowledges that the testimony of Dinardo was probably decisive in convicting Murdoch. The trial in this case was held more than twelve years after the robbery-murder. The events took place quickly. No eyewitness claimed to be acquainted with the perpetrators before the date of the robbery-murder. At trial, there were two weak identifications of the petitioner by eyewitnesses and one somewhat stronger identification. Without Dinardo's testimony, it is questionable whether the jury would have convicted Murdoch. The prosecutor obviously believed that. Otherwise, she would not have offered to reduce Didonato's offense to manslaughter in exchange for his testimony.

Dinardo's testimony was crucial. Evidence that Dinardo had earlier told a story different from that which he told the jury might conceivably have caused the jury to doubt Dinardo's trial testimony. The difficulty in this case is that Dinardo's prior inconsistent statement was inextricably linked with other statements which either conflicted with other evidence or were demonstrably false. Given those problems, this court should not find that admission of the December 1, 1994 letter would have changed the jury's ultimate determination of Murdoch's guilt. If the court finds that the failure to admit Dinardo's letter at Murdoch's trial constituted a violation of the Confrontation Clause, the court should find that the error was harmless.

The failure of the California courts to determine whether Murdoch's right of confrontation trumped Dinardo's claim of privilege was contrary to the law of this case as found by the Ninth Circuit. However, the failure to admit the contents of the letter into evidence did not violate the Confrontation Clause because the contents of the letter did not have substantial probative value in the light of the other evidence in this case. Even if the contents of the letter are deemed to have significant probative value and the failure to admit the letter into evidence violated the Confrontation Clause, the error was harmless. The court should deny the remaining two claims of the petition.

RECOMMENDATION

The magistrate judge therefore recommends that the court issue an order: (1) approving and adopting this Third Report and Recommendation; and (2) directing that judgment be entered denying the petition on the merits with prejudice.

Dated: March 2, 2005

s/
JAMES W. McMAHON
United States Magistrate Judge

[FILED APRIL 7, 2005]

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA –
WESTERN DIVISION

CHARLES MURDOCH, Petitioner, v. ROY CASTRO, Warden, et al., Respondents.	Civil No. CV-99-06900-RSWL (Mc) ORDER ADOPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636(b)(1)(C), the court has reviewed the pleadings and other papers herein, the Third Report and Recommendation of United States Magistrate Judge, and the objections thereto, and accepts and adopts the Magistrate Judge's findings, conclusions and recommendations. The court has made a de novo determination of those portions of the report as to which objection has been made.

IT IS ORDERED that the Clerk shall serve copies of this Order and the Judgment by United States Mail on the petitioner and the Attorney General for the State of California.

Dated: April 7, 2005

s/
RONALD S.W. LEW
United States District Judge

ENTERED
CLERK U.S. DISTRICT COURT
APR - 8 2005
CENTRAL DISTRICT OF
CALIFORNIA
DEPUTY

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CHARLES FRANKLIN MURDOCH, JR., Defendant and Appellant.	B100877 (Super. Ct. No. NA020621) MARCH 26, 1998
In re CHARLES FRANKLIN MURDOCH, JR., on Habeas Corpus.	B112047

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles D. Sheldon, Judge. The judgment in case number B100877 is modified and, as modified, affirmed. The petition for writ of habeas corpus in case number B112047 is denied.

Barbara Springer Perry, under appointment by the Court of Appeal, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Carol Wendelin Pollack, Senior Assistant Attorney General, Robert F. Katz, Supervising Deputy Attorney General, and David Andrew Eldridge, Deputy Attorney General, for Plaintiff and Respondent.

Charles Franklin Murdoch, Jr., appeals from the judgment entered following his conviction, by jury trial, of first degree murder with special circumstances (during the commission of robbery and burglary) and attempted premeditated murder, with a principal armed finding (Pen. Code, §§ 187/190.2, subd. (a)(17), 664/187, 12022, subd. (a)(l)). Sentenced to a state prison term of life without the possibility of parole, plus one year, he contends: the in-court identification made by one eye-witness should have been suppressed as the fruit of an illegal arrest; the testimony of an accomplice should not have been admitted; the trial court improperly excluded certain evidence as protected by the attorney-client privilege; the trial judge was biased; a continuance should have been granted; a new trial motion should have been granted; evidence of an uncharged crime should not have been admitted; a consciousness of guilt instruction should not have been given; the attempted murder conviction was

barred by the statute of limitations. Murdoch has concurrently filed a habeas corpus petition that also raises the attorney-client privilege claim.

The habeas corpus petition will be denied. The attempted murder conviction will be stricken, and the judgment as modified will be affirmed.

BACKGROUND

1. *Prosecution evidence.*

On May 17, 1983, Dyanne Spence was working as a bartender at the Horseshoe Bar in Long Beach. That evening, Spence saw three men enter the bar by the back door. One man had long blond hair, another was defendant Murdoch, and the third was Mexican or Spanish. The men walked over to the jukebox, looked around and then left by the back door without ordering any drinks. Five minutes later, two of the men returned. A little later, Spence was talking to customer Edward Snow when she noticed a movement to her right. Spence turned toward the movement and saw Murdoch pointing a rifle at customer Robert Nantais. Murdoch shot Nantais and announced, "This is a robbery." Nantais ultimately died from this gunshot wound.

Murdoch then pointed the rifle at Spence and said, "Don't look at me. I will blow your f-ing head off." Snow told Spence to put her hands on the bar and look down at the floor. Spence testified she "[s]tarted to glance down but [then] looked directly at Mr. Murdoch's eyes because there was a rifle pointed in my face."

Another customer, James Hall, first realized something was going on when he noticed out of the corner of his eye a "Latino looking person" who had a small handgun. Hall looked down because he didn't want to stare at anybody. That was all he remembered. According to Spence, another one of the robbers, whom she identified as Dino Dinardo, the long-haired blond, stabbed Hall and then came behind the bar, went to the cash register and took money from the cash drawer.[1] The three robbers then fled.

Ronald Pavek of the Long Beach Police Department was one of the homicide detectives assigned to the investigation. An anonymous tip was received soon after the crime naming Murdoch as one of the perpetrators. Pavek put together a photo array containing Murdoch's picture, but neither Spence nor any of the bar patrons could make an identification. The case was thereafter designated an unsolved crime and the investigation remained dormant until 1994.

Peter Kergil, a fingerprint expert, testified the Long Beach Police Department did not have a computer system in 1983 capable of tracing fingerprints. They did not get a computer terminal with access to a central data base until 1987. In 1994, Kergil compared fingerprints taken from the Horseshoe Bar cash register with other prints in the data base. This led to the identification of Dinardo.

---

[1] At both the preliminary hearing and Dinardo's trial, Spence testified she did not see the face of the man who had done the stabbing.

Kergil testified Dinardo's fingerprints matched the prints taken from the Horseshoe Bar cash register.

When he had been informed of Kergil's computer match, Pavek reopened his investigation. After Spence tentatively identified Dinardo, Pavek arrested him in Berkeley in June 1994. Dinardo admitted his involvement in the robbery and identified Murdoch, by photograph, as one of his accomplices.

Murdoch's brother, John, testified he has known Dinardo since the 1960's; John, Murdoch and Dinardo played together as kids. John had not seen Murdoch with Dinardo since that time.

Patrick Condon testified he and Murdoch have been friends since 1978. Condon knew Dinardo as one of Murduch's friends. Dinardo occasionally visited Murdoch at a residence Condon and Murdoch shared in 1984 and 1985. Condon had seen Murdoch with Dinardo in other places during 1983 on as many as ten occasions.

Dinardo testified he knew Murdoch in the early 1980's. He also said he was pretty sure he had known Murdoch in the 1970's as a kid. On May 17, 1983, Dinardo was in front of his house in West Long Beach when Murdoch came by with a Mexican-American man Dinardo didn't know. Murdoch asked if Dinardo wanted to make some money by doing "a job," which Dinardo understood to mean committing a hold-up or some other form of thievery. Murdoch and the Mexican-American man would be armed with a gun and a knife, and they wanted Dinardo to grab the money out of the cash register.

Dinardo agreed to go along. They rode in a car driven by a fourth person, another Mexican-American man Dinardo didn't know. They drove to the Horseshoe Bar. In the car, Dinardo saw Murdoch had a .22 caliber rifle and the first Mexican-American man had a knife. They wanted Dinardo to carry a knife, but he refused.

Dinardo and the man with the knife entered the Horseshoe Bar through the front door. Dinardo went to a video game machine and waited for Murdoch to arrive. Murdoch came in through the rear door two minutes later, carrying the rifle. Murdoch announced the robbery. That was Dinardo's cue to grab the money. Dinardo heard a gunshot about the time he jumped over the bar to get at the cash register. Dinardo took money and left the bar by the back door. He and the man with the knife returned to the car, which was in the alley behind the bar. Murdoch joined them about a minute later. The $200 Dinardo had grabbed from the cash register was split four ways. Dinardo did not learn anyone had been hurt in the robbery until he was arrested in 1994.

Dinardo next saw Murdoch on the weekend following the Horseshoe Bar robbery. Dinardo was playing basketball at a park with Murdoch's stepbrother. "[Murdoch] asked me how is it going, what's up, would you like to do another job with me, you know, I got a gun in my bag, and he described it as a sawed-off shotgun." Dinardo testified he declined Murdoch's offer.

When Detective Pavek first accused him of the Horseshoe Bar robbery, Dinardo lied and denied any involvement. However, after the officers convinced him they knew he was involved, he admitted his role. Dinardo also implicated someone whom he identified as Charles or Chuck; he could not recall the person's last name. When Pavek showed Dinardo a photo array, Dinardo immediately identified Murdoch's picture.

Dinardo testified he thought police were only pursuing a robbery charge against him; he said he didn't know he had been charged with murder. The officers did not tell him he was under arrest for murder, and he didn't discover this until after he had been taken to the Long Beach jail. Although the officers showed him a photo of the dead victim, they told him they knew he had not done the shooting, so he thought he was in the clear on any murder charge. Dinardo testified he didn't know anything about conspiracy and accomplice liability principles. He acknowledged he had been convicted of first-degree murder in connection with the Horseshoe Bar robbery and that he had been sentenced to a prison term of 25 years-to-life. In return for testifying against Murdoch, Dinardo acknowledged his sentence would be reduced. He had been promised a 12-year sentence which, after taking account of presentence and good time credits, meant he would be released in about five years. He understood this deal was contingent on his testifying truthfully.

2. *Defense evidence.*

An expert on eyewitness identification testimony explained the various factors affecting an eyewitness identification: the duration of the witness' observation; the lighting conditions; the stress the witness may have been experiencing during the event; whether the witness and the person identified are of the same or different races; the length of time between the crime and when the identification was made; whether the witness had seen the suspect since the time of the crime; etc.

DISCUSSION

1. *In-court identification properly admitted.*

Detective Pavek obtained a warrant for Murdoch's arrest on September 12, 1994. Three days later, Murdoch was put into a live lineup and Dyanne Spence, the bartender at the Horseshoe Bar, identified him as the person who had shot Robert Nantais. Spence subsequently identified Murdoch at trial. Murdoch contends the arrest warrant was issued without probable cause and that Spence's in-court identification should therefore have been suppressed. This claim is meritless.

A magistrate's order issuing a warrant may be set aside only if, as a matter of law, the affidavit fails to provide sufficient competent evidence to support the magistrate's finding of probable cause. (*People v. Campa* (1984) 36 Cal.3d 870, 878; *People v. McDaniels* (1994) 21 Cal.App.4th 1560, 1564.) "[P]robable cause requires only a probability or substantial chance of criminal activity, not an actual

showing of such activity. By hypothesis, therefore, innocent behavior frequently will provide the basis for a showing of probable cause. . . ." (*Illinois v. Gates* (1983) 462 U.S. 213, 245, fn. 13 [76 L.Ed.2d 527].) A reviewing court should give great deference to the magistrate's finding of probable cause. (*People v. Glenos* (1992) 7 Cal.App.4th 1201, 1206-1207; *People v. Fernandez* (1989) 212 Cal.App.3d 984, 986.) "[A]s a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal. Having said this, we hasten to point out that a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." (*Ornelas v. United States* (1996) 517 U.S. 690 [134 L.Ed.2d 911].) A reviewing court must uphold the trial court's factual findings if they are supported by substantial evidence. (*People v. Williams* (1988) 45 Cal.3d 1268, 1301.)

Detective Pavek's arrest warrant declaration provided the magistrate with the following information: reports of witness statements taken at the time of the robbery; an investigative report prepared at the time of the robbery; the anonymous tip accusing Murdoch which police had received soon after the robbery; Dinardo's statement to police identifying Murdoch as his accomplice in the robbery; and the identification of the fingerprints lifted from the Horseshoe Bar cash register in 1983 as belonging to Dinardo. Murdoch argues this information was insufficient to establish probable

cause of his involvement in the Horseshoe Bar robbery. We disagree.

"In *Gates*, the United States Supreme Court adopted a totality-of-the-circumstances test for assessing whether an affidavit based on hearsay establishes probable cause. [Citation.] Under the test, veracity, reliability, and basis of knowledge are intertwined factors which illuminate the practical question whether there is probable cause. . . . [Citation.] [¶] . . . [¶] Even if doubts are entertained as to an informant's motives, an explicit and detailed description of alleged wrongdoing, along with a statement the event was observed firsthand, entitles the tip to greater weight than might otherwise be the case." (*People v. Rochen* (1988) 203 Cal.App.3d 684, 688.)

According to Pavek's search warrant declaration, Dinardo had admitted his role in the Horseshoe Bar robbery and identified Murdoch as the man who had shot Nantais. Dinardo's admission against penal interest was a valid factor in gauging the reliability of his information. (See *United States v. Harris* (1971) 403 U.S. 573, 583-584 [29 L.Ed.2d 723] [although it does not always lend credibility to accusations against another, informant's admission of crime may carry indicia of credibility sufficient to establish probable cause]; *U.S. v. Tarazon* (9th Cir. 1993) 989 F.2d 1045, 1049 [admission against informant's penal interest is corroborating detail].)

In *United States v. Long* (8th Cir. 1971) 449 F.2d 288, the validity of a search warrant based on information from an admitted participant in a bank

robbery was affirmed over the claim an admitted armed robber could not be considered a credible person. "In this case, the credibility and reliability of the informant was adequately established by the disclosure in the affidavit that the informant was an admitted participant in the crime and therefore an eyewitness to most of the acts constituting the crime as described in the affidavit." (*Id.*, at p. 293.) In *United States v. Brown* (9th Cir. 1972) 455 F.2d 1201, an apparently victimized teller in a bank robbery subsequently admitted her involvement in the crime. On appeal, the defendants argued the teller's FBI statement was, by itself, insufficient to support an arrest warrant. Rejecting this claim, the appeals court reasoned the teller's "change in her original story thereby implicating herself in the crime reasonably leads to the conclusion that she was now telling the truth. Based on her admission and identity of [a defendant], probable cause existed for the issuance of the arrest warrant." (*Id.*, at p. 1203; see also *U.S. v. Laboy* (1st Cir. 1990) 909 F.2d 581,585-586 [first-hand information from untested informant constituted probable cause for warrantless arrest where informant described his own role in kidnapping].)

California cases have reached similar results. In *People v. Belmontes* (1988) 45 Cal.3d 744, Bolanos took part in a burglar that resulted in a killing. Bolanos pled guilty to burglary and received immunity from prosecution for murder. Bolanos then testified against Belmontes, who argued on appeal (in the context of an ineffective assistance of counsel claim) the warrant for his arrest "was

facially invalid because it was based solely on the uncorroborated accusation of accomplice Robert Bolanos." (*Id.*, at p. 766.) The argument was rejected. "[T]he circumstances of the crime and evidence found at the crime scene -- as summarized in the [arrest warrant] affidavit -- corroborated Bolanos's statement. Bolanos asserted the murder was committed in the course of a burglary during which McConnell's stereo was stolen and later fenced -- the affiant, Detective Holman, declared that the victim's house had been found ransacked. Bolanos stated defendant had beaten the victim with an iron bar causing defendant to become splattered with blood -- such was consistent with the nature of the victim's injury ('blunt trauma to the head') noted in the autopsy results incorporated into the affidavit. [¶] Moreover, although defendant stresses that Bolanos had a self-serving interest in 'pegging' him as the actual killer, all three participants in the burglary (defendant, Vasquez and Bolanos) shared felony-murder liability for McConnell's murder." (*Id.*, at pp. 768-769, fn. omitted.)

People v. Moore (1988) 47 Cal.3d 63, also involved an accomplice granted immunity from prosecution in exchange for testifying. As in *Belmontes*, Moore claimed to have suffered ineffective assistance of counsel because his trial attorney failed to move to suppress the fruits of a search incident to arrest on the ground the arrest warrant had been deficient under *Gates*. Moore's claim was rejected: "[T]he arrest warrant was based on information supplied by Avery, an admitted accomplice. Thus, the information was sufficient to support the issuance of

the arrest warrant. [Citing *Gates*.] Counsel was not required to bring a motion on grounds which could not prevail . . . ." (*Id.*, at p. 82.)

The fact Dinardo's fingerprints had been discovered on the Horseshoe Bar cash register corroborated his statement. So too did the information from the investigative report that police had recovered a badly damaged .22-caliber round from the bar, because this matched Dinardo's statement Murdoch had been carrying a small rifle, probably a .22. "The purpose served by corroboration is 'to establish that the information provided by the informant did not constitute a made-up story, one fabricated out of whole cloth. Corroboration of part of the information provided by the informant [gives] credibility to the remainder of the information.' [Citation.]" (*People v. Rochen*, *supra*, 203 Cal.App.3d at p. 689.)[2] In addition, there

---

[2] Murdoch's reliance on *People v. Campa*, *supra*, 36 Cal.3d 870, is misplaced for two reasons. First, as a case arising before the adoption of Proposition 8, *Campa* did not apply federal principles of Fourth Amendment law. (*People v. Belmontes*, *supra*, 45 Cal.3d at 767.) Second, in *Campa* there was no corroborative information supporting the accomplice's credibility. (*Id.*, at p. 768) *Campa* itself recognized the second point: "This is not to say that in all such cases the statement of a coparticipant implicating a suspect in criminal activity should be disregarded in finding probable cause for issuance of a warrant. Admissions may be made under circumstances in which their credibility is enhanced. Other 'indicia of reliability,' such as the arrestee's record for veracity or corroborative evidence obtained independently may buttress the credibility of an arrestee's statement. Alternatively, the affidavit may provide background information describing the circumstances under which the informant's statement was

was the anonymous tip police had received soon after the robbery, which claimed a man named "Charles Murdock" had been involved in the Horseshoe Bar robbery. Murdoch asserts the anonymous tip was "discredited" because none of the witnesses, including Spence, could identify Murdoch's picture in 1983. However, we would characterize the anonymous tip as merely unhelpful in 1983. When put together in 1994 with Dinardo's statement implicating Murdoch, the 1983 tip became very helpful.

Hence, we conclude there was probable cause for issuing the arrest warrant.

2. *Dinardo's testimony properly admitted.*

Murdoch contends the trial court erred by admitting Dinardo's testimony on the ground it was inherently unreliable. This claim is meritless.

" ' "[A] defendant is denied a fair trial *if the prosecution's case depends substantially upon accomplice testimony* and the accomplice witness is placed, either by the prosecution or the court, under a strong compulsion to testify in a particular fashion." ' [Citation.]" (*People v. Morris* (1991) 53 Cal.3d 152, 191, disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.) "[W]hen an accomplice is granted immunity on

---

made. In some cases, this contextual information itself will provide a sufficient basis to support a conclusion that the declarant's information is credible. This affidavit provided no such information." (*People v. Campa, supra,* 36 Cal.3d at pp. 883-884.)

condition that his or her testimony substantially conform to an earlier statement given to police, the testimony is tainted beyond redemption and its admission denies the defendant a fair trial. 'On the other hand, although there is a certain degree of compulsion inherent in any plea agreement or grant of immunity, it is clear that an agreement requiring only that the witness testify fully and truthfully is valid. [Citation.]' " (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1219.)

In *DiSantis*, the accomplice Masse was sentenced to life without possibility of parole after he was convicted at trial. He then contacted police, "saying he wanted to give a complete account of his and defendant's role in the . . . crimes, and hoped his sentence could be reduced. The officers agreed to intercede with the district attorney's office, which in turn persuaded Masse's trial judge to recall his sentence pending the outcome of defendant's trial. After the officers took a tape-recorded statement from Masse, they told him that if he wanted to receive any benefit from the statement it would have to be true and verifiable and he would have to testify against defendant." (*People v. DiSantis, supra*, 2 Cal.4th at p. 1218.) Masse was resentenced after he testified against DeSantis. On appeal, DiSantis claimed the admission of Masse's testimony was a due process violation because the mere possibility of such a greatly reduced sentence gave him a powerful inducement to commit perjury. This claim was rejected. "[F]rom Masse's perspective the degree of

compulsion was not overwhelming,[3] and *more important*, the only demand Masse understood the agreement made of him was to tell the truth. Such a bargain did not make the trial fundamentally unfair, and hence did not offend defendant's due process rights. [¶] . . . [¶] We also find of paramount significance the fact that the jury was aware of the bargain: Masse was extensively and effectively examined by defendant's counsel on his expectations of a reduced sentence following his testimony. The jury had every opportunity to discount or entirely disbelieve Masse's testimony -- an opportunity enhanced by the court's instructions that Masse was an accomplice as a matter of law and that an accomplice's testimony is to be distrusted. The jury chose to believe Masse and not defendant despite the examination and instructions." (*Id.*, at pp. 1219-1220, fn. omitted, italics added.)

The facts in the case at bar are quite similar to those in *DeSantis*. After being convicted in a separate trial for first degree murder and receiving a sentence of 25 years-to-life, Dinardo came to an agreement with the People to testify against Murdoch in return for a reduced sentence. Dinardo admitted all of this on cross-examination. Murdoch's jury was instructed Dinardo was an accomplice whose testimony was not to be trusted.

---

[3] Masse expected the special circumstance finding against him to be overturned on appeal, leaving him about a 17-year term, whereas, in return for testifying, he hoped to have his sentenced reduced to 12 years in a protected custody situation.

Murdoch has not cited any authority striking down the admission of accomplice testimony in exchange for a reduced sentence such as occurred in this case. Despite accusations the People ambushed him with Dinardo's testimony, it appears Murdoch's trial attorney got discovery of all of Dinardo's police statements, knew Dinardo had turned down an offer of a reduced sentence in return for testifying against Murdoch six months before trial started, and had been advised by the prosecutor Dinardo was a potential witness. When an agreement was finally struck between the People and Dinardo, both the trial court and Murdoch's counsel were informed. Although Murdoch argues the People used, or considered using, the threat of a grant of immunity to coerce Dinardo into testifying in conformity with is police statement, it is hard to understand how this threat could have had any leverage as Dinardo was already in prison serving a life term. In any event, it is clear from the record Dinardo believed the agreement required only that he testify truthfully.

Murdoch asserts Dinardo "admitted at trial that when he gave his statement to the police, he would have said whatever it took to get out of custody, including pointing out someone else whom he thought the police wanted him to identify as being involved in the crime." Murdoch's implication -- that Dinardo admitted he was willing to lie to help himself -- is untrue. Read in context, Dinardo said no more than that he had been willing to identify an

accomplice if it would keep him out of custody.[4] We also reject Murdoch's argument his case is analogous to *Franklin v. State* (1978) 577 P.2d 860, a case discussed in *DeSantis*. The *DeSantis* opinion makes it clear why the analogy is false. "We find *Franklin* inapposite. First, though it is unclear what bargain was struck in that case, the court stated that the prosecution 'bargain[ed] for specific testimony to implicate a defendant . . . .' [Citation.] Second, there was no independent inculpatory evidence against the defendant whatever, . . . " (*People v. DeSantis, supra,* 2 Cal.4th at p. 1221, fn. 4.) Murdoch's citation of *People v. Medina* (1974) 41 Cal.App.3d 438, does not help him. That case is inapposite because it involved conditional immunity orders expressly stating the accomplices had to testify in conformity with their prior statements to police (*id.*, at p. 455).

As for Murdoch's assertion the trial court did not have the power to reduce Dinardo's sentence in these circumstances, we have already noted the almost identical resentencing that occurred in *DeSantis*. Under Penal Code section 1170, subdivision (d), a trial court "may, within 120 days of the date of commitment on its own motion . . . recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced,

---

[4] Dinardo was asked whether he would have fingered "someone else that may, may have been involved in the crime," *not* whether he would have fingered an innocent person just to please the police.

provided the new sentence, if any, is no greater than the initial sentence." Under this statute, *the trial court can recall a sentence "for any reason rationally related to lawful sentencing. The court may then impose any otherwise lawful resentence suggested by the facts available at time of resentencing.*" (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 456, italics added.)

As *Dix* explained: "In sum, we see no reason to conclude that section 1170(d), contrary to its terms, limits the reasons why a trial court may exercise its statutory authority to recall and resentence. We hold that section 1170(d) permits the sentencing court to recall a sentence for any reasons which could influence sentencing generally, even if the reason arose after the original commitment. The court may thereafter consider any such reason in deciding upon a new sentence [and] . . . impose any new sentence that would be permissible under the Determinate Sentencing Act if the resentence were the original sentence. [¶] Accordingly, even if the recall of Bradley's prison sentence was prompted by Bradley's postcommitment offer of testimony in another case, the court's action did not exceed its jurisdiction under section 1170(d). Nor is the court precluded by section 1170(d) from taking Bradley's cooperation into account when imposing any new sentence." (*Dix v. Superior Court, supra,* 53, Cal.3d at p. 463, fn. omitted; cf. *People v. Pritchett* (1993) 20 Cal.App.4th 190, 194-195 [trial court abused its discretion by recalling sentence solely to extend defendant's time for filing notice of appeal, "a reason completely unrelated to sentencing"].)

Dix also teaches that even if there were a jurisdictional problem with Dinardo's resentencing, Murdoch lacks standing to raise the issue. Dix had been the victim of an aggravated assault by Bradley. The trial court recalled Bradley's prison sentence after he offered to testify in an unrelated case. Dix sought, by writ petition, to overturn the recall order and prevent substitution of a new sentence. But the Supreme Court concluded Dix, "who is not a party to Bradley's criminal case, has no standing to challenge the application of section 1170(d) to Bradley's sentencing." (*Dix v. Superior Court, supra,* 53 Cal.3d at p. 450.) The same rule would appear to apply to Murdoch.

3. *Attorney-client privilege properly upheld.*

Prior to opening statements, the prosecutor informed the trial court and defense counsel she had discovered, during an interview with Dinardo, the existence of a letter in which Dinardo apparently claimed he had been coerced by police into implicating Murdoch. This letter was in the possession of Jack Fuller, Dinardo's lawyer, who asserted the attorney-client privilege on Dinardo's behalf. The trial court ruled the letter was entitled to the privilege, a decision Murdoch contends was incorrect. This claim is meritless.[5]

---

[5] The letter remains under seal by order of this court. On December 3, 1996, we granted Murdoch's appellate counsel access to the letter. On April 1, 1997, we denied Murdoch's motion to unseal the letter, ruling he had failed to show the attorney-client privilege had been waived. On August 1, 1997,

"Under [Evidence Code] section 954, a client holds a privilege to prevent the disclosure of confidential communications between client and lawyer . . . . '[C]onfidential communications' include 'information transmitted between a client and his or her lawyer in the course of that relationship and in confidence' (§ 952)." (*People v. Gionis* (1995) 9 Cal.4th 1196, 1207.) "As to the attorney-client privilege, a client -- whether or not he is a party to a particular proceeding -- has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication to or from the lawyer -- and it is the lawyer's duty to claim the privilege on his client's behalf whenever necessary to prevent an unauthorized disclosure. (Evid. Code, §§ 954, 955.) Assuming the requisite relationship and confidential communication, the privilege is absolute and disclosure may not be ordered, without regard to relevance, necessity or any particular circumstances peculiar to the case. [Citation.] The term 'confidential communication' is broadly construed, and communications between a lawyer and his client are presumed confidential, with the burden on the party seeking disclosure to show otherwise. [Citations.]" (*Gordon v. Superior Court* (1997) 55 Cal.App.4th 1546, 1557.)

The trial court's ruling on a question of evidentiary privilege is reviewed for abuse of discretion. (*People v. Mickey* (1991) 54 Cal.3d 612, 654.) "On appeal, the scope of judicial review is

---

we granted the People's request to view the outside of the envelope (but not the letter itself).

limited. 'When the facts, or reasonable inferences from the facts, shown in support of or in opposition to the claim of privilege are in conflict, the determination of whether the evidence supports one conclusion or the other is for the trial court, and a reviewing court may not disturb such finding if there is any substantial evidence to support it [citations].' [Citation.]" (*People v. Gionis, supra,* 9 Cal.4th at p. 1208, fn. omitted.)

Murdoch first claims the record fails to establish Dinardo's letter was actually privileged. In this regard, Murdoch asserts the party claiming the privilege has the burden of showing the privilege should be given in the particular case. He relies on this language from *Gionis*: "Although the attorney-client privilege is essential to our system of justice, it can and does result in the withholding of relevant information from the fact finder. Therefore, '[t]he party claiming the privilege carries the burden of showing that the evidence which it seeks to suppress is within the terms of the statute.' [Citations.]" (*People v. Gionis, supra,* 9 Cal.4th at p. 1208.) But the question in *Gionis* was whether the statement at issue had been made during the course of an attorney-client relationship. Here, there is no dispute the statements had been made during the course of any attorney-client relationship (that is, the statements were made by Dinardo in a letter delivered to his then-defense counsel, Kenneth Star, who later gave the letter to Fuller, Dinardo's current attorney). The only question here is whether the statements were intended to be confidential. And on

that question Evidence Code section 917[6] creates a presumption that attorney-client communications are privileged and places on the opponent of the privilege the burden of proving a communication was *not* privileged. (*North v. Superior Court* (1972) 8 Cal.3d 301, 310; *Geilim v. Superior Court* (1991) 234 Cal.App.3d 166, 176.)

Murdoch first argues that we know the letter was not meant to be confidential because "in initially disclosing the existence of the letter, the prosecutor stated that Dinardo had told her he prepared the letter 'at the request and assistance' of [Murdoch]:" based on this. Murdoch asserts his own "participation or consultation in the preparation of the letter took it outside the privilege ab initio, despite its later delivery to Dinardo's attorney." However, "request and assistance" does not necessarily mean Murdoch actually helped write the letter or had any other role in its production. Dinardo's rather ambiguous statement could mean any number of things. It does not prove he did not intend the contents of the letter to be confidential.

Murdoch then argues the actual delivery of the letter proves it was not meant to be confidential.

---

[6] Evidence Code section 917 provides: "Whenever a privilege is claimed on the ground that the matter sought to be disclosed is a communication made in confidence in the course of the lawyer-client, physician-patient, psychotherapist-patient, clergyman-penitent, or husband-wife relationship, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential."

Although the letter had been delivered to Dinardo's former attorney, Kenneth Star, it was inside an envelope which had been addressed to both Star and Murdoch's former attorney, Nelda Barrett. Murdoch argues, "By delivering the letter addressed in this fashion, Dinardo impliedly authorized his attorney to disclose its contents to appellant's counsel." However, the names of Star and Barrett appear to have been written by very different hands. And if anything, Star's name appears to have been written in the same hand as the letter itself; it is Barrett's name which appears to have been written by someone other than Dinardo. Thus, the more logical inference from this evidence is actually that Dinardo intended the letter to be a confidential attorney-client communication.

Lastly, Murdoch argues "the entire tenor of the letter itself bespeaks an intention on Dinardo's part to make its contents public." However, whatever implications may be read into the letter tin his regard are, at a minimum, offset by Dinardo's delivery of the letter only to his own attorney. Given the presumption contained in section 917, we conclude the trial court did not abuse its discretion by finding the letter was intended to be confidential. (*See People v. Mickey, supra*, 54 Cal.3d at p. 654.)

Murdoch next claims that even if the letter had originally been privileged, Dinardo subsequently waived the privilege by his "partial oral disclosure of its contents to the prosecutor." No so. Murdoch asserts: "[T]he prosecutor stated to the court that she had learned of both the existence of the letter

and its contents from her interview with Dinardo. Subsequent disclosure of an originally privileged communication to a third party waives the privilege." But the prosecutor did not tell the trial court she knew what the letter said. The prosecutor only stated, "[I]t's my understanding -- I have never read the letter, I've never seen the letter, nor do I have a copy of the letter, . . . -- but that the letter I guess in sum and substance stated that Mr. Dinardo was coerced by the police into implicating defendant Murdoch in this crime." Hence, the prosecutor only related to the trial court her "understanding" and her "guess." Moreover, the People point out Murdoch did not assert this theory of admissibility at trial, which Murdoch does not dispute, and hence there was no effort by the trial court to clarify precisely what Dinardo told the prosecutor. " '[I]t is an elementary rule that ordinarily matters not presented to the trial court and hence not a proper part of the record on appeal will not be considered on appeal.' (*People v. Brawley* (1969) 1 Cal.3d 277, 294.) This rule recognizes that an appellate court is in fact a reviewing court and hence should not go outside the record to resolve questions not presented to the trial court. (*People v. Pearson* (1969) 70 Cal.2d 218, 221-222, fn. 1.)" (*People v. Webb* (1986) Cal.App.3d 401, 410).

Finally, Murdoch claims that even if the letter fell within the attorney-client privilege, and if the privilege was not subsequently waived, his need to discover the contents of the letter outweighed Dinardo's interest in confidentiality because the letter was "directly exculpatory. It expressly

contradicted the version of events which Dinardo told at trial -- and at the time of his arrest -- with respect to appellant's culpability." In his habeas petition, Murdoch asserts the letter did even more because it "substantively exculpates petitioner." We are not persuaded. "[I]t is patent that the attorney-client privilege is not one to be easily discarded merely because a defendant asserts that invocation of the privilege results in the denial of his right to a fair trial." (*People v. Godlewski* (1993) 17 Cal.App.4th 940, 947.) "[W]e conclude that only the most extraordinary circumstance would justify disclosure of privileged communications between lawyer and client . . . ." (*Id.*, at p. 945.) We do not find such an extraordinary circumstance here.

4. *No due process violation based on judicial bias.*

Murdoch contends he was denied due process because of judicial bias. He claims the trial court's bias against him manifested itself when the court: participated in the unlawful sentencing arrangement which led to Dinardo's testimony; suppressed evidence Murdoch needed to prepare and present his defense (including the letter held inadmissible under the attorney-client privilege); failed to grant a continuance necessary for trial preparation; refused to follow statutory judicial disqualification procedures; and, improperly handled Murdoch's new trial motion. This contention is meritless.

We have already determined the trial court had a reasonable basis for concluding Dinardo's resentencing was proper.

Murdoch argues the trial court suppressed important evidence by keeping from defense counsel the fact that People had made "promises" to Dinardo. However, the prosecutor only told the trial court an offer had been made to Dinardo; she did not report any final agreement. Murdoch cites no authority requiring the defense to be informed about the progress of negotiations that might or might not result in an agreement to have an accomplice testify. The trial court here accurately reported no binding promises had yet been made.

We have already determined the trial court properly ruled Dinardo's letter to his attorney was privileged.

We will conclude, below, the trial court properly denied Murdoch's request for a continuance.

Murdoch's claim regarding the trial court's alleged failure to follow proper statutory procedures (see Code Civ. Proc., § 170.1 et seq.) for disqualifying judges is not cognizable on this appeal. "Under our statutory scheme, a petition for writ of mandate is the exclusive method of obtaining review of a denial of a judicial disqualification motion." (*People v. Mayfield* (1997) 14 Cal.4th 668, 811.) "Section 170.3(d) forecloses appeal of a claim that a *statutory* motion for disqualification authorized by section 170.1 was erroneously denied, and this preclusion applies even when the statutory basis for the motion appears to codify due process grounds for challenging the impartiality of a judge. [Citations.]" (*People v. Brown* (1993) 6 Cal.4th 322, 334.)

Finally, Murdoch claims the trial court revealed its bias by the comments it made while denying his new trial motion. But the challenged comments relate to the other examples of alleged bias we have already commented on, and Murdoch points to nothing that would sustain his assertion the trial court's comments "reflect[ed] a continuing effort not only to suppress the evidence essential to appellant's defense, but also to prevent any examination into the question of the court's own bias."

In sum, Murdoch claims he has "demonstrate[d] that Judge Sheldon had prejudged appellant's guilt long before the trial started, that he joined the prosecution's efforts to bring about appellant's conviction by active assistance in procuring the evidence essential to conviction, while suppressing and sealing any evidence that could have produced another verdict." We fail to see how any of this has been demonstrated.

5. *Continuance properly denied.*

Murdoch contends the trial court erred by denying his request for a continuance to prepare for Dinardo's testimony. This claim is meritless.

The grant or denial of a motion for a continuance is within the sound discretion of the trial court and may only be granted on a moving party's showing of good cause, which requires a demonstration that both the party and counsel have been diligent in preparing for trial. On appeal, the trial court's ruling is reviewed for abuse of discretion. (*People v. Mickey*, *supra*, 54 Cal.3d at p. 660.) A trial court is not required to automatically accept every

representation that counsel is not prepared to go to trial. (See Pen. Code, § 1050; *People v. Howard* (1992) 1 Cal.4th 1132, 1171-1172.)

Murdoch argues his trial attorney "sought the information necessary to prepare his defense as soon as he learned that there was a possibility that Dinardo would testify." Not so. As the record demonstrates, counsel knew months earlier the People had made an offer to reduce Dinardo's sentence if he would testify against Murdoch. Counsel also knew Dinardo had already been convicted by a jury of first degree murder for his part in the Horseshoe Bar robbery. In addition, the prosecutor had apparently indicated early on she intended to call Dinardo as a witness. The trial court found it was "absolutely clear from the beginning of this case, from the time you first undertook it . . . that there was a possibility [Dinardo] might testify." We agree. It appears the continuance request came only after it was absolutely certain Dinardo would testify.[7]

6. *Ruling on new trial motion.*

Murdoch contends the trial court should have recused itself from hearing a new trial motion predicated on the court's own bias. "Instead, the judge, in essence, became a witness before himself,

---

[7] Contrary to Murdoch's assertion, defense counsel had been informed of Dinardo's past dealings with law enforcement. The prosecutor said she had no information that Dinardo had testified in any other case. At an evidentiary hearing, Dinardo testified none of his prior offenses involved codefendants and that he had not given police information about anyone else.

making factual statements about matters known personally to him, while leaving appellant bereft of his . . . right to cross-examine." This claim is meritless. It appears Murdoch waived this claim by not objecting below to the trial court's hearing the new trial motion. The People assert there was no objection, Murdoch does not dispute the assertion, and we find no evidence of an objection. Moreover, defense counsel acknowledged at the hearing he was "not contending that this court was actually biased because, obviously, I have no facts to indicate that."

7. *Sufficient evidence of special circumstance findings.*

Murdoch contends there was insufficient evidence to sustain the special circumstance findings (murder during the commission of robbery and burglary) because the jury returned a "not true" finding on the accompanying firearm use allegation. From this, Murdoch concludes the jury must have believed he did not shoot the victim, but had merely been an aider and abettor. Not true. "Inconsistent findings by the jury frequently result from leniency, mercy or confusion. [Citation.] Such inconsistencies in no way invalidate the jury's findings. Therefore, any inconsistency between the jury's findings could not have supported the trial court's decision to grant a new trial on the murder count since the trial court also found that the jury's verdict was supported by substantial evidence." (*People v. York* (1992) 11 Cal.App.4th 1506, 1510 [inconsistency between murder conviction and special circumstance finding does not invalidate murder conviction].)

8. *Other crimes evidence proper.*

Murdoch contends the trial court erred by allowing Dinardo to testify that, on the weekend following the Horseshoe Bar robbery, Murdoch solicited Dinardo's participation in another crime. Murdoch argues this evidence had no relevance to the charged offenses and therefore constituted impermissible "propensity" evidence. This claim is meritless. Dinardo testified Murdoch asked him if he wanted to "do another job," meaning another robbery. This evidence was relevant because it showed Murdoch's acknowledgement of his participation in the Horseshoe Bar robbery.

9. *Consciousness of guilt instruction proper.*

Murdoch contends the trial court erred by giving the jury a consciousness of guilt instruction grounded on the allegation Murdoch tried to suppress evidence by changing his appearance. This claim is meritless.

CALJIC No. 2.06 is proper when evidence exists that, if believed by the jury, would support the suggested inference of guilt. (*People v. Crandell* (1988) 46 Cal.3d 833, 870-871.) "Whether or not any given set of facts may constitute suppression or attempted suppression of evidence from which a trier of fact can infer a consciousness of guilt on the part of a defendant is a question of law. Thus in order for a jury to be instructed that it can infer a consciousness of guilt from suppression of adverse evidence by a defendant, there must be some evidence in the record which, if believed by the jury, will sufficiently support the suggested inference.

Furthermore, the determination of whether there is such evidence in the record is a matter which must be resolved *by the trial court before* such an instruction can be given to a jury." (*People v. Hannon* (1977) 19 Cal.3d 588, 597-598.) A change in a defendant's appearance between the commission of the crime and the trial is evidence from which a trier of fact may infer consciousness of guilt. (*People v. Randle* (1992) 8 Cal.App.4th 1023, 1036 [evidence defendant's hairstyle had changed during pendency of case]; *People v. Slutts* (1968) 259 Cal.App.2d 886, 893 [consciousness of guilt reasonably inferred where defendant shaved off beard shortly after crime committed].)

Murdoch argues there was no evidence to support such an instruction. In the trial court, the People argued various photographs taken of Murdoch over the years showed significant changes in his appearance. Defense counsel argued Murdoch's hair was only slightly different, and emphasized the many years that had gone by. The trial court remarked it was allowing the instruction "because I look at the pictures and, of course, I was able to see the defendant here in court." This was the proper inquiry before giving the jury the consciousness of guilt instruction.

Murdoch also argues he was prejudiced because several photographs pictured him wearing jail clothes or with unkempt grooming. He complains, "The instruction did not specify which change in appearance the jury could consider; it left the jury free to draw the inference consciousness of guilt from

the change appellant's clothing. In other words, it permitted the jury to draw a negative inference from appellant's exercise of his constitutional right to appear in civilian dress at trial." We are not persuaded that showing the jury a photo of Murdoch wearing jail clothes completely undermined the effect of his wearing civilian clothes at trial. In any event, if an instruction correct in law required clarification, it was up to Murdoch to ask for a modification during trial. "A party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language." (*People v. Lang* (1989) 49 Cal.3d 991, 1024.)

10. *Ex post facto claim.*

Murdoch contends his conviction for premeditated attempted murder (arising out of the stabbing of James Hall, the second victim) must be reversed because it violated the statute of limitations. The People disagree, although they concede the trial court improperly imposed a life sentence for this conviction because at the time of the Horseshoe Bar robbery the maximum penalty for attempted murder was nine years. We agree with Murdoch's claim the conviction itself was barred.

In 1983, attempted murder was punishable by a prison term of five, seven or nine years, and carried

a statute of limitations of three years.[8] In 1984, the Legislature did two things. It extended the statute of limitations applicable to attempted murder to six years,[9] and, by enacting Penal Code section 799, it did away with any statute of limitations for offenses carrying a possible life term. Then in 1986, the Legislature amended Penal Code section 664 -- the general "attempt" statute -- to provide "that when the crime attempted is 'willful, deliberate, and premeditated murder,' the person guilty of that attempt shall be subject to the punishment of imprisonment for life with the possibility of parole. [Citation.]" (*People v. Bright* (1996) 12 Cal.4th 652, 656.)

From these facts, Murdoch argues the statue of limitations on his 1983 attempted murder ran on May 17, 1989 under section 800, while the People argue the non-limit of section 799 applies. Both sides agree on the legal difference between extending an existing limitations period and resurrecting a limitations period that has lapsed. " 'It is settled law in California that a criminal statute of limitations period, in effect on the date of an alleged offense, may lawfully be extended before, but not after, it has run as to the offense.' " (*People v. Bunn* (1997) 53 Cal.App.4th 227, 235.) The People argue the 1986

---

8 Under former Penal Code section 800, the statute of limitations was three years for felonies not otherwise dealt with expressly.

9 Penal Code section 800 provides for a six-year statute of limitations for offenses carrying a possible penalty of eight years of more.

amendment "indirectly" extended an "existing limitations period." We disagree.

As *Bunn* explained, "There is . . . a principled distinction to be drawn between the two types of enactments. An amendment extending the limitations period for a . . . charge as to which the previously applicable statute of limitations has expired *re*criminalizes conduct that, by lapse of time and operation law, has been rendered exempt from prosecution -- and punishment -- for all time. When an amendment operates to extend an unexpired statute of limitations, the new law reminds offenders that they are subject to prosecution and punishment for relatively recent conduct, and places them on notice that they will remain so for a longer period of time than anticipated at the time of the offense. As Judge Learned Hand explained in *Falter v. United States* (2d Cir. 1928) 23 F.2d 420, 'Certainly it is one thing to revive a prosecution already dead, and another to give it a longer lease on life. The question turns upon how much violence is done to our instinctive feelings of justice and fair play. For the state to assure a man that he has become safe from pursuit, and thereafter to withdraw its assurance, seems to most of us unfair and dishonest. But, while the chase is on, it does not shock us to have it extended beyond the time first set, or, if it does, the stake forgives it.' [Citation.]" (*People v. Bunn*, supra, 53 Cal.App.4th at p. 237.)

Following the reasoning of *Bunn*, we conclude the statue of limitations contained in section 799 cannot be applied to a 1983 attempted murder. In 1984,

Murdoch faced a possible sentence of five, seven or nine years if convicted of attempted murder in a prosecution commenced by May 1989. In 1986, anyone *thereafter* committing premeditated attempted murder faced a possible life sentence; and anyone so charged could, pursuant to section 799, be prosecuted at any time. The People argue, "[I]f there is no constitutional violation when a limitation period is extended *directly* via an amendment to one statute in 1984, there can be no reasoned claim of such a violation when the same practical consequence -- i.e., another extension of the limitation period -- is accomplished *indirectly* via an amendment to another statute in 1986." But if, as the People concede, the 1986 amendment creating a life term for premeditated attempted murder cannot be applied to Murdoch without violating ex post facto principles,[10] how can the 1986 enactment be said to have put him on notice the statute of limitations applicable to his 1983 crime had been extended? How can the new 1984 limitations period apply to him when the statute in which it is contained did not apply to him when it was enacted and is only linked to him by a 1986 statute which also cannot be applied to him? In the words of Judge Hand, such a result would offend our notions of justice and fair play.

---

[10] The 1986 amendment to the attempt statute established for the first time an increased penalty for attempted murder if the jury made the further determination the murder attempted had been premeditated. (*People v. Bright*, *supra*, 12 Cal.4th at pp. 665-669.)

DISPOSITION

The attempted murder conviction is stricken. As so modified, the judgment is affirmed. The petition for writ of habeas corpus is denied.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

KLEIN, P.J.

We concur:

CROSKEY, J.

KITCHING, J.

Second Appellate District, Division Three,
No. B100877/B112047
SO6996

IN THE SUPREME COURT OF CALIFORNIA

SUPREME COURT
FILED
JUL - 8 1998
Robert Wandruff Clerk
Deputy

In Re CHARLES FRANKLIN MURDOCH JR.

On Habeas Corpus

THE PEOPLE, Respondent
v.
CHARLES FRANKLIN MURDOCH, Appellant.

Appellant's petition for review DENIED.

GEORGE
Chief Justice